APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1239

THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee,

CEMEX, S.A.,
Defendant-Appellee,

and

APASCO, S.A. DE C.V.,
Defendant-Appellee.

DECIDED: January 5, 1994

Before MAYER and LOURIE, *Circuit Judges*, and LAY, *Senior Circuit Judge.**

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* Honorable Donald P. Lay, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

LAY, *Senior Circuit Judge.*

This is an appeal from a decision of the Court of International Trade brought by the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement.[1] The Ad Hoc Committee filed an antidumping petition that resulted in investigations of imports of cement and cement clinker from Mexico. The Committee alleged that imports of gray portland cement and cement clinker from Mexico were being, or were likely to be, sold in the United States at less than fair value within the meaning of 19 U.S.C. § 1673 (1988). The Committee alleged that as a result of the unfair price, an industry in the United States was materially injured or threatened with material injury by reason of these imports. The International Trade Administration of the United States Department of Commerce (Commerce) compared the United States and home-market sales of three Mexican producers of cement, including defendant-intervenors Cemex, S.A., and Apasco, S.A. de C.V., as well as Cementos Hidalgo, S.C.L., and reached a final determination that Mexican cement and clinker were being, or were likely to be, sold in the United States at less than fair value. Gray Portland Cement and Clinker from Mexico, 55 Fed. Reg. 29,244 (Dep't Comm. 1990). The Antidumping Act provides that a foreign producer engages in dumping to the extent that the United States price (USP),[2] as calculated pursuant to 19 U.S.C.

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[1] The Ad Hoc Committee is an association of United States producers of gray portland cement and clinker with production facilities in Arizona, New Mexico, Texas, and Florida.

[2] USP is initially measured as either the "purchase price" or "exporter's sales price" (ESP) of the merchandise, whichever is appropriate. 19 U.S.C. § 1677a(a) (1988). "Purchase price" is the price at which a buyer in the United States agrees to purchase the merchandise from a reseller or from the foreign manufacturer. *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1577 (Fed. Cir. 1993); 19 U.S.C. § 1677a(b) (1988). This measure of USP is used where the U.S. importer is an unrelated, independent party. *Smith-Corona Group v. United States*, 713 F.2d 1568, 1572 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). "Exporter's sales

§ 1677a, is less than the foreign market value (FMV)[3] of the same or similar merchandise, calculated pursuant to 19 U.S.C. § 1677b.[4] Following its determination that dumping had occurred, and a separate finding by the International Trade Commission that a United States industry was being materially injured by imports of gray

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price" is the price at which the foreign manufacturer or its agent sells or agrees to sell the merchandise in the United States. *Zenith*, 988 F.2d at 1577; 19 U.S.C. § 1677a(c) (1988). It is used where the importer is related to the foreign manufacturer, such that an arm's length transaction does not occur until the goods are resold to a retailer or to the public. *Smith-Corona*, 713 F.2d at 1572. In this case, Commerce used the purchase price approach. Once the initial USP figure is established, the statute then specifically requires Commerce to deduct, in the section relevant to this appeal, any amount "attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States." 19 U.S.C. § 1677a(d)(2)(A) (1988).

[3] Commerce measures FMV as the foreign manufacturer's sales price in the "ordinary course of trade" in its own country, for goods identical or similar to the goods exported to the United States. 19 U.S.C. § 1677b(a)(1)(A) (1988). Where reliable information regarding a foreign manufacturer's home country sales is lacking, Commerce may base FMV on the price of merchandise offered for export sale to countries other than the United States, 19 U.S.C. § 1677b(a)(1)(B) (1988), or on a "constructed value," 19 U.S.C. § 1677b(a)(2) (1988); *Zenith*, 988 F.2d at 1577. In this case, Commerce based FMV on the foreign manufacturers' home-market sales. Like USP, FMV is to be adjusted to account for various factors. *See* 19 U.S.C. § 1677b(a)(1), (4) (1988). Unlike the USP provision, however, the FMV provision does not list shipping costs among the amounts to be deducted.

[4] 19 U.S.C. § 1673 (1988) requires Commerce to assess antidumping duties on imported merchandise "in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise." Thus, the higher the FMV and the lower the USP, the greater the margin of dumping and the greater the antidumping duty that will be imposed. *See Zenith*, 988 F.2d at 1576.

portland cement and cement clinker from Mexico,[5] Commerce published an antidumping duty order reflecting its calculations of the manufacturers' margins of dumping. Gray Portland Cement and Clinker from Mexico, 55 Fed. Reg. 35,443 (Dep't Comm. 1990).

The Ad Hoc Committee challenged Commerce's calculations of the dumping margins in the Court of International Trade. *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 787 F. Supp. 208 (Ct. Int'l Trade 1992). The court[6] upheld Commerce's deduction from foreign market value of the costs of transporting cement from the manufacturing plants to storage facilities in Mexico prior to its sale to home-market (Mexican) customers. *Id.* We reverse and remand.

II.

The sole issue on appeal is whether the foreign market value provision of the antidumping statute, 19 U.S.C. § 1677b, authorizes a deduction from foreign market value of pre-sale transportation costs within the exporting country for goods sold within that country. The parties agree that although the Act requires Commerce to deduct transportation costs from USP, there is no specific statutory authorization for Commerce to deduct home-market transportation expenses from its calculations of FMV. In the past, Commerce determined whether to deduct home-market transportation costs by looking to the "circumstances of sale" provision of 19 U.S.C. § 1677b(a)(4)

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[5] Gray Portland Cement and Cement Clinker from Mexico, USITC Pub. 2305, Inv. No. 731-TA-451 (Aug. 1990) (final determination), *aff'd sub nom. Cemex, S.A. v. United States*, 790 F.Supp. 290 Ct. Int'l Trade 1992), *aff'd*, 989 F.2d 1202 (Fed. Cir. 1993) (table).

[6] The Honorable Jane A. Restani, United States Court of International Trade.

(1988).[7] This provision and its accompanying regulations, *see* 19 C.F.R. § 353.56(a)(1) (1993), require a direct relationship between an expense and the sale at issue. Commerce's longstanding general practice, therefore, was to deduct from foreign market value only those transportation costs incurred *after* the date of sale, when the direct relationship was established. *See, e.g.*, Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 Fed. Reg. 18,992, 19,049 (Comment 33) (Dep't Comm. 1989) (final determination); Television Receivers, Monochrome and Color, from Japan, 53 Fed. Reg. 4050, 4052 (Comment 18) (Dep't Comm. 1988) (final results); Color Television Receivers from Korea, 53 Fed. Reg. 24,975, 24,988 (Comment 72) (Dep't Comm. 1988) (final results); Kraft Condenser Paper from Finland, 47 Fed. Reg. 3813 (Dep't Comm. 1982) (final results). Pre-sale transportation expenses were treated as "indirect expenses," deductible from FMV only when ESP was used as the basis for the United States price. *See* 19 C.F.R. § 353.41(e)(2) (1993). In the case at bar, however, Commerce altered this practice and deducted pre-sale inland freight expenses while conducting a purchase price, rather than the exporter's sale price, comparison. In the present case, Commerce does not rely on the circumstances of sale provision, but on its inherent

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[7] This provision states:

> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—
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> (B) other differences in circumstances of sale; . . .
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> then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4) (1988).

power as the administering authority to fill "gaps" in the statutory framework in reasonable ways consistent with the objectives of the antidumping law.[8]

Commerce argues, and the Court of International Trade agreed, that it has the discretion to deduct home-market transportation costs from foreign market value because the statute is silent and doing so furthers its primary goal when calculating FMVs and USPs of comparing "apples with apples," i.e., comparing prices of merchandise in the United States with those in the foreign market at a similar point in the chain of commerce. *Ad Hoc Comm.*, 787 F. Supp. at 212-13 (citing *Smith-Corona*, 713 F.2d at 1578). The deduction from FMV, when combined with the statutorily mandated deduction from USP, means that on both sides, ex-factory prices will be the basis for comparison. *Id.* Without the deduction from FMV, the comparison is apples to oranges: ex-factory prices in the United States but the *ex-warehouse* price in the foreign market.

The Ad Hoc Committee disputes the initial premise that the statute is silent. In its view, the fact that the deduction is included in the provisions for USP but not for FMV means that Congress did not intend for home-market transportation costs to be deducted.

III.

It is well established that where Congress has included specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission. *Russello v. United States*, 464 U.S. 16, 23 (1983) (citing *United States v. Wong Kim Bo*, 472 F.2d

[8] Although intervenors urge that we affirm the Court of International Trade judgment under the "circumstances of sale" provision, we decline the invitation. It is well settled that an agency's action may not be upheld on grounds other than those relied on by the agency. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

720, 722 (5th Cir. 1972)); *see also United States v. Azeem*, 946 F.2d 13, 17 (2d Cir. 1991); *United States v. Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir.), *cert. denied*, 492 U.S. 924 (1989); *Arizona Elec. Power Cooperative, Inc. v. United States*, 616 F.2d 1366, 1375 (9th Cir. 1987). Absent strong evidence to the contrary, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992).

The applicability of this principle was made clear in *Zenith Electronics Corp. v. United States*, 988 F.2d 1573 (Fed. Cir. 1993), where we held that Commerce erred when it adjusted both the USP and the FMV to account for Japanese commodity taxes that were collected on merchandise sold in Japan, but not collected on merchandise exported to the United States. We noted that 19 U.S.C. § 1677a(d)(1)(C) (1988) explicitly requires Commerce to increase USP by the amount of taxes that the exporting country would have assessed on the merchandise if it had been sold in the home market. *Zenith*, 988 F.2d at 1580. Commerce applied the circumstances of sale provision to adjust FMV in an effort to achieve tax neutrality in its comparisons, reasoning that adjusting USP to account for the forgiven commodity tax would cause an increase in the dumping margin not directly related to less-than-fair-value sales. *Id.* at 1578. We rejected this approach, concluding that "[t]he Act is not silent about the disparity created between FMV and USP when a foreign government forgives commodity taxes on exports. Section 1677a(d)(1)(C) expressly directs Commerce to adjust USP. In the face of an unambiguous statutory directive, Commerce may only effect tax adjustments under that section." *Id.* at 1582.

In the circumstances of this case, we believe that had Congress intended to deduct home-market transportation costs from FMV, it would have made that intent clear.

FMV and USP are intimately related concepts, given full meaning only by their relationship to one another. The Antidumping Act revolves around the difference between the two. *See* 19 C.F.R. § 353.2(f)(1) (1993) (defining dumping margin with reference to USP and FMV). In slightly different forms, the USP provision, 19 U.S.C. § 1677a, and the FMV provision, 19 U.S.C. § 1677b, were passed together as part of the original Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921). From the Act's beginning, therefore, it is likely Congress has considered one only with reference to the other and has been well aware of any differences between them. That Congress included a deduction for transportation costs from USP but not from FMV leads us to conclude that Congress did not intend pre-sale home-market transportation costs to be deducted from FMV.[9]

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[9] The language of the original Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921), provides strong support for this conclusion. In the original Act, mention of transportation costs is even more conspicuously absent from the FMV provision than it is today. The Act defines "purchase price," what has since 1980 been part of USP, as being the agreed upon price for the merchandise:

> plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, *less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States* . . . .

Id. § 203 (emphasis added). Foreign market value is defined in part with the *identical* language, but without any mention of shipping costs. *Id.* § 205. Thus, FMV is the ordinary home market price:

> plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person

IV.

In reaching its decision, the Court of International Trade upheld Commerce's interpretation of § 1677b in part because it was "loath to tell ITA it cannot be more fair than it has been in the past when the statute would seem to allow it some room to make the fairer choice." 787 F. Supp. at 213. Thus, the court urged that deduct-

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by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase.

Id. Even given the vagaries of the legislative drafting process, it is impossible to imagine that Congress unintentionally included the same phrasing in the two passages only up to the point where the deduction for transportation costs from USP was discussed. The omission of the transportation cost deduction from FMV seems fully intended.

Since passage of the original Act, the antidumping laws have been amended and the continuity of the identical phrasing has been eliminated, but the substance of today's USP and FMV statutes remains unchanged. Indeed, despite two significant amendments to the antidumping laws in the past ten years—in the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984), and in the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988)—Congress has not altered the Act's treatment of home market transportation costs. Congress has not done so, even though it was advised by Commerce in its 1985 "Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change" that Commerce believed it lacked statutory authorization to deduct home market transportation costs from FMV. That Congress knew of the agency's prior interpretation of the Act and, despite twice amending other Act provisions, did nothing to change the interpretation or the statutory language on which it was based is persuasive evidence that the agency's prior interpretation was the one intended by Congress. *See Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1522 (Fed. Cir. 1993); *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1105-06 (Fed. Cir. 1990) (quoting *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974)). In such circumstances, we cannot attribute the difference between the statute's treatment of transportation costs under the USP and FMV provisions to Congressional inadvertence or inattention.

ing pre-sale home transportation costs from FMV "engenders a more accurate and meaningful comparison," *id.*, and better serves Commerce's "primary goal" of comparing "apples with apples," *id.* at 212 (citing *Smith-Corona*, 713 F.2d at 1578). Under *Chevron*[10] and its progeny, however, courts do not consider the reasonableness of an agency's interpretation of a statute unless the relevant statute is silent or ambiguous on the question at hand. *See Glaxo Operations UK Ltd. v. Quigg*, 894 F.2d 392, 398 (Fed. Cir. 1990). The general prescriptions of *Smith-Corona*, which serve to guide Commerce in making reasonable interpretations of the Antidumping Act, do not apply where the Act itself clearly expresses the intent of Congress. *Zenith*, 988 F.2d at 1582. Because we believe the antidumping statute is not silent on the question of pre-sale home-market transportation cost deductions from FMV, therefore, the reasonableness or fairness of Commerce's interpretation of the Antidumping Act is irrelevant.

Even if the statute's "primary goal" may seem to be ill-served by not allowing the deduction from FMV, that conclusion does not justify reading into the statute agency discretion that clearly is not there. As the Supreme Court stated in *Rodriguez v. United States*, 480 U.S. 522 (1987) (per curiam):

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Id. at 525-26. Congress acts through bargaining and compromise; legislation frequently includes provisions that are not entirely consistent with the general statutory

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[10] *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

purpose. In *Glaxo Operations UK Limited v. Quigg*, 894 F.2d 392 (Fed. Cir. 1990), we rejected a claim that the Commissioner of Patents and Trademarks' interpretation of 35 U.S.C. § 156 was more consistent with the general purpose of the Act of which it was a part than the plain statutory language. We concluded:

> We simply cannot say that the plain meaning of section 156 would provide unwanted results because Congress may very well have contemplated all the ramifications of its chosen definition in light of the political realities as seen played out in the legislative process, and we must assume it did.

Glaxo, 894 F.2d at 397. We make a similar assumption here. Congress may have wanted the differential for any of a number or reasons, the most evident of which being to increase the likelihood and size of dumping margins found by Commerce. Whatever the reason, it is not this court's role to substitute its view of the statute's purpose for the plain language, or conspicuous lack thereof, in the statute.

Finally, we note that the result of giving effect to the lanuage of the statute by denying the deduction of home-market transportation costs from FMV are not so "absurd" as to justify departure under such cases as *Ambassador Division of Florsheim Shoe v. United States*, 748 F.2d 1560 (Fed. Cir. 1984) and *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). In *Ambassador*, we held that applying the plain statutory language of two tariff provisions, passed together in *pari materia*, would result in one provision frustrating or partially repealing the other. *Id.* at 1565. No such conflict occurs here. Deduction of transportation costs from USP but not FMV creates a *different* comparison than would obtain if the costs were deducted from FMV as well, but neither provision frustrates the operation of the other. As indicated by the fact that Commerce applied the deduc-

tion to USP alone for more than a decade without disastrous consequences, the plain language does not lead to absurd results.

V.

For the foregoing reasons, the judgment of the Court of International Trade with respect to Commerce's deduction of pre-sale home-market transportation costs from FMV is reversed. The case is remanded with direction that Commerce recalculate the dumping margins involved in this case without such deductions.

Costs award to plaintiff-appellant.

REVERSED AND REMANDED.

UNITED STATES COURT OF
INTERNATIONAL TRADE

No. 90-10-00508

THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT,
Plaintiff,

v.

UNITED STATES,
Defendant,

and

APASCO, S.A. DE C.V., AND CEMEX, S.A.,
Defendant-Intervenors.

March 5, 1992

OPINION

RESTANI, Judge:

Plaintiff, an association composed of United States producers of gray portland cement and cement clinker with production facilities in Arizona, New Mexico, Texas and Florida, challenges the final determination of sales at less than fair value by the United States Department of Commerce, International Trade Administration ("ITA" or "Commerce") in *Gray Portland Cement and Clinker from Mexico*, 55 Fed.Reg. 29,244 (Dep't Comm.1990) ("Final Determination" or "Final Det."). In the determination, ITA concluded that imports of gray portland

cement and clinker from Mexico are being, or are likely to be, sold in the United States at less than fair value ("LTFV"). Plaintiff, representing domestic cement producers, challenges the level of LTFV margins. Cemex, S.A. ("Cemex") and Apasco, S.A. de C.V. ("Apasco"), Mexican producers of the subject merchandise, are defendant-intervenors in this action.

I. Background

In response to a petition filed by plaintiff on behalf of the domestic cement industry, ITA initiated an antidumping investigation of imports of gray portland cement and cement clinker from Mexico. *Gray Portland Cement and Clinker from Mexico,* 54 Fed.Reg. 43,190 (Dep't Comm. 1989).

On April 12, 1990, by notice published in the *Federal Register*, ITA issued a preliminary affirmative determination of sales at less than fair value. *Gray Portland Cement and Clinker from Mexico,* 55 Fed. Reg. 13,817 (Dep't Comm.1990). Following verification of the questionnaire responses, ITA published its final affirmative determination of sales at less than fair value. Final Det., 55 Fed.Reg. 29,244.

On August 30, 1990, an antidumping duty order was published in the *Federal Register. Gray Portland Cement and Clinker from Mexico,* 55 Fed.Reg. 35,443 (Dep't Comm.1990).[1] In this order, Cemex was assigned a final

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[1] On November 13, 1989, the United States International Trade Commission ("ITC") published its preliminary finding that a domestic industry was materially injured by reason of imports of this cement. *Gray Portland Cement and Cement Clinker from Mexico,* USITC Pub. 2235, Inv. No. 731-TA-451 (Nov. 1989). In August 1990, ITC published its final affirmative determination. *Gray Portland Cement and Cement Clinker from Mexico,* USITC Pub. 2305, Inv. No. 731-TA-451 (Aug. 1990). The material injury determination is before this court in *Cemex, S.A. v. United States,* Court No. 90-10-00509.

dumping margin of 58.38% and Apasco—53.26% A third Mexican producer not a party in this appeal, Cementos Hidalgo, S.C.L., was assigned a dumping margin of 3.69%. The "all other" category of Mexican producers and exporters of the subject merchandise received a dumping margin of 58.05%.

II. Issues and Decision

Plaintiff raises three issues:

1. Whether ITA erred by comparing Cemex's home market and United States sales at two distinct levels of trade;

2. Whether ITA erred by deducting home market inland freight charges incurred by Cemex and Apasco from foreign market value ("FMV"); and

3. Whether ITA erred by not initiating a sales below cost of production ("COP") investigation of Cemex's home market sales of Type V cement.

Oral argument was held on February 20, 1992. At that time, the court ordered remand on the first issue and upheld ITA's decision on issues two and three. This opinion further explains the court's ruling from the bench.

III. Discussion

A. Remand is necessary for ITA to explain its rationale for comparing Cemex's home market and United States sales at different levels of trade.

The "level of trade" regulation provides:

> The Secretary normally will calculate foreign market value and United States price based on sales at the same commercial level of trade. If sales at the same commercial level of trade are insufficient in number to permit an adequate comparison, the Secretary will calculate foreign market value based on

> sales of such or similar merchandise at the most comparable commercial level of trade as sales of the merchandise and make appropriate adjustments for differences affecting price comparability.

19 C.F.R. § 353.58 (1991). Authority for this regulation is found in the statutory provision mandating adjustments to foreign market value for "other differences in circumstances of sale." 19 U.S.C. § 1677b(a)(4)(B) (1988).

During the period of the investigation, Cemex maintained that its pricing policies for sales of the subject merchandise did not vary according to the type of customer or the level of trade. Pub.R.Doc. 126 at 12. Rather, Cemex attributed price variance to the differing competitive conditions in different sales regions. *Id.* In the preliminary determination ITA treated all home market sales as if they were made at a single level of trade. *See* 55 Fed.Reg. 13,817.

On June 13, 1990, Cemex raised the level of trade issue with ITA, arguing that ITA should not combine the sales to distributors with the sales to end-users in making the fair value comparison. Pub.R.Doc. 269 at 937-38. In comment 9 of its final determination, ITA stated: "[W]e determined that CEMEX had sufficient sales in the home market at the same commercial level of trade as its U.S. sales to permit an adequate comparison to all U.S. sales." Final Det. at 29,248. This statement is ambiguous. It does not reflect that ITA found two distinct levels of trade in each market and that it chose to make comparisons on two different levels, although the parties seem to agree that ITA did make separate comparisons. Absent from the final determination is an explanation of why ITA reversed its preliminary determination which combined distributor and end-user sales. Although ITA consents to remand to consider this issue anew, plaintiff requested that ITA be directed to follow its preliminary methodology.

As the court stated at oral argument, the level of trade issue must be remanded so that ITA may explain its analysis and rationale for concluding that Cemex's sales should be compared at two different levels of trade based on the evidence submitted in this case. The court declines to give further direction in view of the absence of reasoning and the presence of some evidence of two levels of trade. This issue requires further consideration by the agency before the court can make a determination as to ITA's level of trade methodology.

B. It was reasonable for ITA to deduct pre-sale inland freight expenses from FMV.

In its final determination, ITA deducted from FMV inland freight expenses that were incurred prior to the date of sale, stating:

> We have deducted from the U.S. price inland freight which represents movement expenses from the plant to the storage facility. Therefore, to ensure an "apples-to-apples" comparison, we have deducted movement expenses from the plant to the storage pick-up point on home market sales in our determination of FMV.

Final Det. at 29,251 (Comment 27). Plaintiff alleges that this deduction is contrary to ITA's standard practice of denying direct expense deductions to FMV for presale inland freight charges and further, that the new procedure violates the anti-dumping law.

Pursuant to statute and regulation, ITA must reduce the United States price by any expenses "incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States." 19 U.S.C. § 1677a(d)(2)(A) (1988); 19 C.F.R. § 353.41(d)(2)(i) (1991). No corresponding provision exists with regard to FMV. Under 19 U.S.C. § 1677b(a)(4)(B) and the implementing regulation, however, FMV may be adjusted for differenences

in the circumstances of sale that are directly related to sales of the merchandise in the home market.[2]

Although Cemex and Apasco argue that ITA's determination is sustainable based on the circumstances of sale provision because the expenses are directly related to the sales, ITA did not rely on this provision in its treatment of home-market pre-sale inland freight expenses. Thus, ITA's determination as to this issue rests not on the circumstances of sales adjustment historically used by ITA,[3] but on a seemingly new approach that uses prices

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[2] 19 U.S.C. § 1677b(a)(4) (1988) provides, in part, as follows:

> (4) Other adjustments
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> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—
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> . . . .
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> (B) other differences in circumstances of sale;
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> . . . .
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> then due allowance shall be made therefor.

The ITA regulation which implements this circumstance of sale provision provides as follows:

> (a) *In general.* (1) In calculating foreign market value, the Secretary will make a reasonable allowance for a *bona fide* difference in the circumstances of the sales compared if the Secretary is satisfied that the amount of any price differential is wholly or partly due to such difference. In general, the Secretary will limit allowances to those circumstances which bear a *direct relationship* to the sales compared.

19 C.F.R. § 353.56(a)(1) (1991) (emphasis added in last sentence).

[3] Defendant admits, and a review of ITA determinations indicates, that in the past ITA, when U.S. purchase price is involved, has refused to grant a circumstance of sale adjustment to FMV for pre-sale inland freight charges, instead it has treated these expenses as nonallowable indirect selling expenses. *See* Defendant's Brief at 18; *Portable Electric Typewriters from Japan*, 45 Fed. Reg. 18,416, 18,418 (Dep't Comm.1980) (final admin. review) (no

at the factory gates for comparison, which necessarily would involve inland freight deductions on both sides of the equation.

In this case, pre-sale movement expenses were incurred in both the home market and the United States market. The similarity of selling procedures in both markets distinguishes this case from prior ones discussing pre-sale costs. *See Silver Reed America, Inc. v. United States*, 7 CIT 23, 581 F.Supp. 1290 (1984), *rev'd on other grounds sub nom., Consumer Prod. Div., SCM Corp. v. Silver Reed America, Inc.*, 753 F.2d 1033 (Fed.Cir.1985); *LMI-La. Metalli Industriale, S.p.A. v. United States*, 13 CIT 305, 712 F.Supp. 959 (1989), *aff'd in part, rev'd in part*, 912 F.2d 455 (Fed.Cir.1990). In both of these cases, pre-sales expense deductions were discussed only with regard to the home market side; thus, it was only the circumstances of sale provision which could justify a deduction.

Plaintiff views ITA's new approach as a circumvention of the circumstances of sale provision. The court doubts a circumvention is occurring because it would appear to be an unnecessary one. The court does not find the clarity in the circumstances of sale provision that is apparent to plaintiff. The obvious thrust of the statute is a fair comparison. The absence of language addressing a

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adjustment for the costs of transporting subject merchandise from factory to distribution warehouse because expense not directly related to particular sale); *Television Receivers, Monochrome and Color, from Japan*, 53 Fed.Reg. 4,050, 4,052 (Dep't Comm.1988) (final admin. review) (home market inland freight costs incurred before date of sale treated as indirect selling expense); *Color Television Receivers from the Republic of Korea*, 55 Fed.Reg. 26,225, 26,230 (Dep't Comm.1990) (final admin. review) (inland freight expense should be treated as indirect selling expense). Although they are capped at the U.S. expense level, as a general matter indirect selling expenses are allowed as an adjustment to FMV if exporter's sales price is used on the U.S. side of the equation. *See* 19 C.F.R. § 353.56(b)(2) (1991). This case, however, involves purchase price, not exporter's sales price.

movement deduction in the FMV statute suggests no hard and fast rule to the court in view of Congress' broad direction to make adjustments for differences in circumstances of sale and its lack of direction as to which exact price factors to use. Even ITA's regulation is not as absolute as plaintiff would imply; ITA prefaces its direct expenses deduction rule with the words "In general." *See* 19 C.F.R. § 353.56(a)(1).

The court also notes that it cannot find the clear line between pre-sale and post-sale expenses that places all pre-sale expenses in the "indirect expense" category—a line so evident to the court in *Silver Reed* and used by ITA in the past.[4] If ITA's approach was reasonable in *Silver Reed*, the court finds the new approach, with its concentration on a level playing field, even more reasonable. In fact, cases since *Silver Reed* have not used absolute language, but have considered whether ITA's approach was acceptable given the particular facts. *See e.g.*, *LMI*, 13 CIT at 313-14, 712 F.Supp. at 965-66, *aff'd*, 912 F.2d at 457-58.

ITA's primary goal when generating FMVs and United States prices for the purpose of a less than fair value

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[4] In recent cases ITA has permitted a deduction for freight expenses incurred on home market sales. *See e.g., Red Raspberries from Canada*, 56 Fed.Reg. 677 (Dep't Comm.1991) (final admin. review). ITA has explained this change as follows:

> In the past, the Department has treated pre-sale movement expenses incurred on home market sales as either production costs or indirect selling expenses. However, we have reconsidered our treatment of these expenses. The Department does not distinguish between pre-sale and post-sale movement charges when calculating an ex-factory U.S. price. Therefore, to ensure an "apples-to-apples" comparison, the Department has deducted all movement charges, pre-sale and post-sale, from foreign market value.

Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, from Japan, 56 Fed.Reg. 26,054, 26,056 (Dep't Comm.1991) (final admin. review).

determination is to compare "apples with apples." *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1578 (Fed.Cir.1983).[5] As the Federal Circuit explained in *Smith-Corona*, a "fair comparison" is required. *Id.* In the case at bar, ITA reasoned that to obtain an "apples to apples" comparison, the ex-factory price in the United States should be compared to the ex-factory, not the ex-warehouse, price in the home market. The court is loath to tell ITA it cannot be more fair than it has been in the past when the statute would seem to allow it some room to make the fairer choice. The deduction of pre-sale inland freight expenses on the home market side engenders a more accurate and meaningful comparison in this case than does plaintiff's approach or any absolute rule based on pre-and post-sale costs. ITA's determination is sustained on this issue.

C. ITA's decision not to initiate a cost of production investigation of Cemex's Type V cement sales is sustained.

During the investigation, plaintiff requested that ITA initiate a sales below cost of production ("COP") investigation with respect to Cemex's home market sales of Type V cement. ITA rejected this request stating:

> Because such sales [of Type V cement] comprise less than [][6] percent of the relevant "such or similar" category, we would not disregard any of these sales for purposes of calculating foreign market value (FMV) even if we were to find all of these sales to be sold below cost. This [] percent volume

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[5] Although plaintiff argues that the "apples-to-apples" policy argument set forth in *Smith-Corona* involved an offset to exporter's sales price, the principle is a general one which has application for all dumping comparisons.

[6] Although this figure is confidential, the parties noted in oral argument that it was a very small number. The court would call it miniscule.

> falls far short of the quantitative threshold that we evaluate, among other factors, to determine whether to disregard below cost sales. *See Timken Co. v. United States*, [11 CIT 786, 806-07], 673 F.Supp. 495, 514-515 (CIT 1987).
>
> Because we could never achieve the intended purpose of the COP statutory provisions in this case, *i.e.*, the exclusion of below cost sales for FMV purposes, initiating a cost investigation under these circumstances would be a futile exercise.

Pub.R.Doc. 182 at 1808-09.

Plaintiff argues on appeal that ITA calculated a separate FMV for home market sales of Type V cement apart from the FMVs calculated for other cement types and therefore, ITA should have examined the COP for Type V cement standing alone. Plaintiff alleges that all or almost all of the Type V cement sales were below cost.

19 U.S.C. § 1677b(a)(1) (1988) provides that "[t]he foreign market value of imported merchandise shall be the price . . . at which such or similar merchandise is sold [in the home market]. . . ." 19 U.S.C. § 1677b(b) (1988) provides in part as follows:

> Whenever . . . [ITA] has reasonable grounds to believe or suspect that *sales in the home market* of the country of exportation . . . have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If . . . [ITA] determines that sales made at less than cost of production—
>
> (1) have been made over an extended period of time and in substantial quantities, and
>
> (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade

> such sales shall be disregarded in the determination of foreign market value.

(emphasis added). In other words, in order to disregard sales made below COP, ITA must find that the relevant sales were made in "substantial quantities" and over an extended period of time.[7] *Id.* The regulation implementing this statute, 19 C.F.R. § 353.51 (1991), reads as follows:

> (a) *Disregarding sales at less than cost.* If the Secretary has reasonable grounds to believe or suspect that the *sales on which the Secretary could base the calculation of foreign market value* . . . are at prices less than the cost of production, the Secretary, in calculating foreign market value, will disregard such sales if they:
>
> (1) Have been made over an extended period and in substantial quantities; and
>
> (2) Are not at prices which permit recovery of all costs within a reasonable period in the normal course of trade.

(emphasis added).

The question is which group of sales is at issue—the full "such or similar merchandise" group of sales or a particular subcategory of "such or similar merchandise," that is, "the sales on which the Secretary could base the calculation of foreign market value." In this case, a sepa-

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[7] ITA practice is not to disregard below COP sales if they "constitute 10 percent or less of total home market sales of the such or similar category of merchandise." *Tubes for Tires, Other than for Bicycle Tires, From the Republic of Korea*, 49 Fed.Reg. 26,780, 26,782 (Dep't Comm.1984) (final admin. review). In *Timken Co. v. United States*, 11 CIT 786, 673 F.Supp. 495 (1987), the court concluded that ITA's practice of disregarding below-cost sales that represent less than ten percent of total home market sales was a reasonable interpretation of the term "substantial quantities." *Id.* at 806-07, 673 F.Supp. at 514-15.

rate FMV for Type V sales was calculated by Commerce. Only the Type V FMV was used in making the fair value comparisons between Cemex's Type V cement sales in the United States and those in the home market. Thus, the sales used by Commerce for calculating FMV for Type V cement were the Type V home market sales which were alleged to be below COP.

ITA's statement of reasons in its determination causes the court some concern. Because it has subdivided the "such or similar merchandise" for purposes of price comparisons, it could be basing a part of the margin on a price-based FMV that should have been replaced by a cost-based FMV. The ten percent rule used in the past has been approved in the context of a unitary "such or similar merchandise" category. *See Timken*, 11 CIT at 806-07, 673 F.Supp. at 514-15. Thus, the court has not previously approved ITA's reasoning that even when it subdivides "such or similar merchandise" for FMV and U.S. price comparison purposes, it may nonetheless re-aggregate the "such or similar" category for purposes of its ten percent rule. The court leaves this issue for another day because, whatever the correct approach, it would not order ITA to undertake a COP investigation in this fair value investigation.

The court made it clear at oral argument that, in view of the miniscule amount of Type V cement imported into the United States, it was interested in any evidence indicating that the margin, which applied to all types of cement in the such or similar category, would change if a COP investigation were undertaken as to Type V cement. Plaintiff did not offer evidence that the weighted average might change by even one-hundredth of a decimal point if ITA undertook a COP investigation of the Type V cement. While its burden of showing potential for a margin change may not be great given its lack of access to particularized cost data, under these circumstances some showing was needed. Given the uncontradicted

statements of the defendant that the margin would not change, the court concludes a COP investigation would be useless at this stage and need not be undertaken.

IV. Conclusion

Remand is required as to the level of trade issue and ITA is directed to explain its rationale for whatever approach it chooses. The court concludes that it was reasonable for ITA to deduct pre-sale inland freight expenses from FMV because such a deduction would permit an accurate comparison of United States price and FMV and the statute and regulations do not prevent such deduction under the facts of this case. ITA's decision not to initiate a COP investigation will not be disturbed where the number of sales alleged to be below cost was so insignificant as compared to the total number of sales that no margin change could be expected.

Remanded.

[A-201-802]

Final Determination of Sales at Less Than Fair Value, Gray Portland Cement and Clinker From Mexico

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: We determine that imports of gray portland cement and clinker from Mexico are being, or are likely to be, sold in the United States at less than fair value. We also determine that critical circumstances do not exist with respect to imports of gray portland cement and clinker from Mexico.

We have notified the U.S. International Trade Commission (ITC) of our determination and have directed the U.S. Customs Service to continue to suspend liquidation of all entries of gray portland cement and clinker from Mexico, as described in the "Continuation of Suspension of Liquidation" section of this notice. The ITC will determine, within 45 days of the publication of this notice, whether these imports materially injure, or threaten material injury to, the U.S. industry.

EFFECTIVE DATE: July 18, 1990.

FOR FURTHER INFORMATION CONTACT: Louis Apple or Brad Hess, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 377-1769 or 377-3773 respectively.

SUPPLEMENTAL INFORMATION:

Final Determination

We determine that imports of gray portland cement and clinker from Mexico are being, or are likely to be, sold in the United States at less than fair value, as provided in section 735 of the Tariff Act of 1930, as amended (19 U.S.C. 1673d(a)) (the Act). The estimated weighted-average margins are shown in the "Continuation of Suspension of Liquidation" section of this notice.

Case History

Since publication of the preliminary determination (55 FR 13817, April 12, 1990), the following events have occurred. On April 9, 1990, respondent CEMEX, S.A. (CEMEX) requested that we postpone making our final determination for a period of 21 days pursuant to section 735(a)(2)(A) of the Act. On April 20, 1990, we published a notice postponing the final determination until July 10, 1990 (55 FR 14989).

On April 19, 1990, petitioner alleged that critical circumstances exist. On May 25, 1990, we published a preliminary finding that critical circumstances do not exist (55 FR 21639).

We verified the questionnaire responses in Mexico from April 23 to May 4, 1990, and in Phoenix, Arizona and Buda, Texas from May 21 to May 22, 1990.

On June 8, 1990, petitioner and respondents CEMEX and Apasco, S.A. de C.V. (Apasco) withdrew their requests for a hearing.

Petitioner and respondents CEMEX and Apasco submitted comments for the record in case briefs dated June 13, 1990, and in rebuttal briefs dated June 18, 1990.

Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the U.S. tariff schedules were fully converted to the Harmonized Tariff Schedule (HTS), as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered or withdrawn from warehouse for consumption on or after this date is now classified solely according to the appropriate HTS subhearings. The HTS subheadings are provided for convenience and U.S. Customs Service purposes. The written description remains dispositive.

The products covered by this investigation include gray portland cement and clinker. Gray portland cement is a hydraulic cement and the primary component of concrete. Clinker, an intermediate material produced when manufacturing cement, has no use other than that of being ground into finished cement.

Gray portland cement is currently classifiable under HTS item number 2523.29, and cement clinker is currently classifiable under HTS item number 2523.10. Gray portland cement has also been entered under HTS item number 2523.90 as "other hydraulic cements".

Period of Investigation

The period of investigation (POI) is April 1, 1989 through September 30, 1989.

Such or Similar Comparisons

Pursuant to section 771(16)(C) of the Act, we established two categories of "such or similar" merchandise: gray portland cement and clinker.

Product comparisons were made on the basis of standards established by the American Society for Testing Materials (ASTM standards). All of the cement sold during

the POI falls within the following three ASTM standards: Type I, Type II, and Type V cement. We compared U.S. sales of bagged cement to home market sales of bagged cement, and we compared U.S. sales of bulk cement to home market sales of bulk cement.

CEMEX and Cementos Hidalgo had no sales of clinker in the United States during the POI. Apasco sold clinger to the United States during the POI, but did not sell clinker in either the home or third country markets. Because of the small volumes involved, we did not use sales of clinker in our analysis.

For cement, all respondents sold identical merchandise (*i.e.*, types of cement) in the home market with which to compare merchandise sold in the United States.

In order to determine whether there were sufficient sales of gray portland cement in the home market to serve as the basis for calculating foreign market value (FMV), we compared the volume of home market sales of cement to the volume of third country sales of cement, in accordance with section 773(a)(1) of the Act. All respondents had sufficient home market sales.

Fair Value Comparisons

To determine whether sales of gray portland cement and clinker from Mexico to the United States were made at less than fair value, we compared the U.S. price to the FMV, as specified in the "United States Price" and "Foreign Market Value" sections of this notice.

United States Price

For CEMEX, we based U.S. price on purchase price where sales were made directly to unrelated parties prior to importation into the United States, in accordance with section 772(b) of the Act. Where sales to the first unrelated purchaser took place after importation into the United States, we based U.S. price on exporter's sales

price (ESP), in accordance with section 772(c) of the Act. For Apasco and Cementos Hidalgo, we based U.S. price on purchase price, because all sales were made directly to unrelated parties prior to importation into the United States.

CEMEX

For CEMEX, we calculated purchase price based on packed, f.o.b. mid-bridge or c.i.f. prices. We made deductions, where appropriate, for discounts and rebates, foreign inland freight, ocean freight, Mexican brokerage, and U.S. brokerage. In accordance with section 772(d)(2)(A) of the Act, we made an additional deduction for U.S. excise taxes and merchandise processing fees. In accordance with section 772(d)(1)(C) of the Act, we added to the U.S. price the amount of value added tax (VAT) that would have been collected on the export sale had it been subject to the tax. We computed the hypothetical amount of the VAT added to the U.S. price by applying the home market VAT rate to a U.S. price net of all charges and expenses incurred as a result of transporting the merchandise outside Mexico.

We calculated ESP based on packed, f.o.b. terminal or c.i.f. prices. We made deductions, where appropriate, for discounts and rebates, foreign inland freight, U.S. inland freight, ocean freight, Mexican brokerage, and U.S. brokerage. In accordance with section 772(d)(2)(A) of the Act, we made an additional deduction for U.S. excise taxes and merchandise processing fees. In accordance with section 772(e)(2) of the Act, we made additional deductions, where appropriate, for credit expenses, packing expenses incurred in the United States, and indirect selling expenses consisting of inventory carrying costs and general indirect selling expenses incurred in Mexico and the United States. We calculated CEMEX's inventory carrying cost using the Mexican interest rate for the Mexican portion of the calculation. We made additons, where

appropriate, for revenue for special delivery charges. In accordance with section 772(d)(1)(C) of the Act, we added to the U.S. price the amount of VAT that would have been collected on the export sale had it been subject to the tax. We computed the hypothetical amount of the VAT added to the U.S. price by applying the home market VAT rate to a U.S. price net of all charges and expenses incurred as a result of transporting the merchandise outside Mexico.

CEMEX reported that some of the cement sold underwent further manufacturing. Because of the small quantity involved, we did not include these sales in our analysis.

Apasco

For Apasco, we calculated purchase price based on the f.o.b. Mexican port price. We made deductions for discounts, foreign inland freight, foreign inland insurance, Mexican brokerage, demurrage, truck loading cost, and ship loading cost. We did not adjust FMV for reported technical service expenses as a direct selling expense, because we could not verify that these expenses were directly related to sales of the subject merchandise. In accordance with section 772(d)(1)(B) and (C) of the Act, we added to the U.S. price the amount of rebated duties and the amount of VAT that would have been collected on the export sale had it been subject to the tax. We computed the hypothetical amount of the VAT added to the U.S. price by applying the home market VAT rate to a U.S. price net of all charges and expenses incurred as a result of transporting the merchandise outside Mexico.

Cementos Hidalgo

For Cementos Hidalgo, we calculated purchase price on the packed, f.o.b. plant or c & f price. We made deductions for ocean and foreign inland freight. In accordance with section 772(d)(1)(C) of the Act, we added to the U.S. price the amount of VAT that would have been

collected on the export sale had it been subject to the tax. We computed the hypothetical price by applying the home market VAT rate to a U.S. price net of all charges and expenses incurred as a result of transporting the merchandise outside Mexico.

Foreign Market Value

In accordance with section 773(a)(1)(A) of the Act, we calculated FMV based on home market sales.

CEMEX

For CEMEX, we calculated FMV based on packed, f.o.b. ex-factory or c.i.f. prices to unrelated and related customers in the home market. We used the related party sales, because the prices to related parties were at or above the prices to unrelated parties and, therefore, were determined to be at arms-length.

We made deductions, where appropriate for discounts, rebates, and inland freight. Where appropriate, we added packing revenue and handling revenue. For comparisons of bagged cement, we deducted home market packing costs from the FMV and added to FMV U.S. packing costs incurred in Mexico.

Pursuant to § 353.56 of the regulations (19 CFR 353.56), we made circumstance of sale adjustments, where appropriate, for differences in credit expenses on purchase price sales. For ESP sales, we deducted credit expenses from U.S. price.

We made a circumstance of sale adjustment in accordance with section 773(a)(4)(B) of the Act to eliminate any differences in taxation between the two markets. Because home market prices were net of VAT, this adjustment was made by adding the hypothetical tax on the U.S. sale to both the U.S. price and the FMV.

For comparisons to ESP sales, we made additional deductions from the FMV for home market indirect selling expenses, which consisted of general indirect selling ex-

penses and inventory carrying costs. We capped the amount deducted for indirect selling expenses incurred in the home market by the amount of indirect selling expenses incurred on sales in the U.S. market, in accordance with § 353.56(b)(2) of our regulations (19 CFR 353.56).

Apasco

For Apasco, we calculated FMV based on f.o.b. plant, pickup point or customer facility prices to unrelated customers in the home market.

We made deductions, where appropriate, for discounts, inland freight, inland insurance, and loading costs. Because all U.S. sales were sales of bulk cement, we used only sales of bulk cement in the home market for our comparisons. Therefore, no packing charges were deducted.

We made circumstance of sale adjustments, where appropriate, for differences in credit expenses, advertising and after-sale storage facilities pursuant to § 353.56 of the regulations (19 CFR 353.56). We made additions for interest revenue for early payments made on certain sales. We did not allow reported technical service expenses as a direct selling expense, because we could not verify that this expense was directly related to sales of the subject merchandise.

We made a circumstance of sale adjustment in accordance with section 773(a)(4)(B) of the Act to eliminate any differences in taxation between the two markets. Because home market prices were net of VAT, this adjustment was made by adding the hypothetical tax on the U.S. sale to both the U.S. price and the FMV.

Cementos Hidalgo

For cementos Hidalgo, we calculated FMV based on packed, f.o.b. plant or c & f prices to unrelated customers in the home market.

We made deductions, where appropriate for discounts and inland freight. For comparisons of bagged cement, we deducted home market packing costs from the FMV and added to FMV U.S. packing costs.

Where appropriate, we made circumstance of sale adjustments for differences in credit expenses and bank fees pursuant to section 353.56 of the regulations (19 CFR 353.56). Since Cementos Hidalgo did not report the bank fees, we resorted to best information available and used the highest verified bank fees on U.S. sales. We also recalculated the U.S. credit expense using the actual credit days on the sales verified. Since the credit days were underreported on all verified sales, we have used the average credit day period of the verified U.S. sales as best information available in our calculation of credit expense on all other U.S. sales.

We made a circumstance of sale adjustment in accordance with section 773(a)(4)(B) of the Act to eliminate any differences in taxation between the two markets. Because home market prices included VAT, this adjustment was made by subtracting VAT from home market prices then adding the hypothetical tax on the U.S. sale to both the U.S. price and the FMV.

Currency Conversion

When calculating FMV, we typically make currency conversions in accordance with § 353.60 of our regulations (19 CFR 353.60), using the exchange rates certified by the Federal Reserve Bank of New York. Since the Federal Reserve Bank of New York did not provide any exchange rates information for Mexico during the period of this investigation, we used the average monthly exchange rates for Mexico published by the International Monetary Fund as a reasonable surrogate for the Federal Reserve exchange rates.

Critical Circumstances

Petitioner alleges that "critical circumstances" exist with respect to imports of gray portland cement and clinker from Mexico. Section 733(e)(1) of the Act provides that critical circumstances exist when we determine that there is a reasonable basis to believe or suspect the following:

(1) That there is a history of dumping of the same class or kind of merchandise, or that the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise at less than fair market value, and

(2) That there have been massive imports of the subject merchandise over a relatively short period.

To determine whether imports have been massive over a relatively short period, we based our analysis on respondents' shipment data for equal periods immediately preceding and following the filing of the petition.

Pursuant to § 353.16(f) and (g) of our regulations, we examined the period beginning in the month following the month in which the petition was filed and ending in the month in which we published our preliminary determination. Because the petition was filed near the end of the month of September, we selected the following month as the beginning of the base period.

We then compared the quantity of imports during the base period over the imports during the immediately preceding period of comparable duration for each of the respondents. We found that shipments from none of the respondents had increased by at least 15 percent during the base period in accordance with 19 CFR 353.16(f)(2). Based on the above, we find that imports of gray portland cement and clinker from Mexico have not been massive over a relatively short period.

Since we do not find that there have been massive imports, we need not consider whether there is a history

of dumping or whether importers of this merchandise knew or should have known that such merchandising was being sold at less than fair value. Therefore, we find that there is no reasonable basis to believe or suspect that critical circumstances exist with respect to imports of gray portland cement and clinker from Mexico.

Verification

As provided in section 776(b) of the Act, we verified all information used in reaching the final determination in this investigation. We used standard verification procedures, including examination of relevant accounting records and original source documents provided by respondents.

Interested Party Comments

Comment 1

Petitioner argues that the Department should treat CEMEX and Cementos de Chihuahua (CDC) as one respondent as was done in the preliminary determination, because the companies are closely intertwined and transactions take place between the companies.

DOC Position

We agree. We determine that CDC and CEMEX do not constitute separate manufacturers or exporters for purposes of the dumping law. The administrative record establishes a close, intertwined relationship between CDC and CEMEX based on their corporate organization and ownership. CDC is predominantly owned by CEMEX, and the companies share common boards of directors. Moreover, CDC and CEMEX have conducted transactions between themselves during the POI. Finally, the production equipment at both companies consist of the same type of equipment so it would not be necessary to retool either company's facilities to shift production. Therefore, we

have treated CDC and CEMEX as one respondent and calculated a single weighted-average margin for CEMEX. See, Final Determination of Sales at Less Than Fair Value: Certain Granite Products from Italy 53 FR 27187, 27189 (1988).

Comment 2

Petitioner argues that the Department should reject the response submitted by Cementos Hidalgo, S.C.L., because it was untimely, incomplete, and inaccurate. Petitioner suggests that, as best information available, the Department should use the "all other" rate.

DOC Position

We do not consider Cementos Hidalgo's response to be untimely. It was submitted in final form on the same day that CEMEX's final response was due. The tape was revised shortly thereafter, but it was submitted before the section B and C deficiency response was due for CEMEX. Although there were some home market sales not reported, these sales accounted for only a small percentage of total home market sales. We have used best information available for these sales. We have also used best information available for the bank commissions which were not reported and for the inaccurate credit days for the U.S. sales.

Comment 3

Petitioner argues that the Department should reject Apasco's voluntary response and use the dumping margin alleged in the petition as best information for the final determination.

Petitioner asserts that voluntary respondents, such as Apasco, must meet a higher standard of accuracy and completeness before their responses are accepted. Petitioner argues that because Apasco failed to report certain sales pursuant to contracts, its response has failed

this higher standard. Apasco maintains that its reporting of all sales is complete and that any deficiencies in its submissions have been insignificant.

DOC Position

We disagree with the petitioner. As set forth in Comment 15 and based upon the findings reported in our verification report, we have determined that Apasco's questionnaire response is accurate and complete.

Comment 4

Petitioner argues that the Department should reject all information favorable to CEMEX that was submitted later than one week prior to verification.

DOC Position

We disagree with petitioner. This information merely includes corrections to the database found in preparation for verification. There were minor corrections to factual information already contained in the record of the proceeding.

Comment 5

For Cementos Hidalgo, petitioner argues that the Department should use best information available for unreported U.S. and home market sales. Petitioner suggests the Department use the "all others" margin from the preliminary determination as best information for these sales.

DOC Position

We have used the highest reported home market price as best information available for the unreported home market sales. We did not find any unreported U.S. sales. There was a slight difference in the reported and verified total U.S. quantities, but the amount was so small that it was negligible.

Comment 6

Petitioner argues that the Department should have accepted its allegations and initiated an investigation of sales below the cost of production.

DOC Position

As outlined in our preliminary determination, we rejected petitioner's allegations because, for CEMEX, the allegation was based on one type of cement, sales of which were so few that they would not have been disregarded in our FMV calculations even if we had found all such sales to have been sold below cost. We rejected the allegation regarding Apasco, because the study used as the basis for the allegation did not identify the costs of the specific products manufactured by Apasco that were alleged to be sold below cost.

Comment 7

CEMEX argues that matching products according to how they are sold is contrary to the antidumping statute and prior Department practice. CEMEX maintain [sic] that in our investigation of cyanuric acid (see, Final Determination of Sales at Less than Fair Value: Cyanuric Acide [sic] and its Chlorinated Derivatives from Japan, 46 FR 7424, 7426 (1984)), the Department deemed physically identical merchandise to be comparable even though the merchandise was packaged differently and intended for different customers. Therefore, the Department cannot base its product matches on descriptions of the merchandise as sold. Furthermore, CEMEX argues that Mexican customers are generally indifferent to whether cement is marketed as Type I or Type II cement, and that matching cement by the way it is marketed and invoiced can achieve absurd results, such as placing the same product in more than one identical matching category.

However the comparisons are made, CEMEX maintains that matching within ranges and standards accepted by the industry as set forth by ASTM is necessary, be-

cause it is the only reasonable way to make a comparison of goods when the chemical composition of those goods necessarily varies. With industry standards as the basis for identical matches, CEMEX argues that there can be no adjustments for differences in merchandise in this case.

Petitioner argues that the Department should match merchandise based on the way it is invoiced. Petitioner maintains that the Cyanuric Acid case cited by CEMEX does not support CEMEX's contention that product matches must be based on physical characteristics, because in Cyanuric Acid there was no contention that the products were mislabelled on home market invoices, or that the products were within more than one industry-recognized specification. Furthermore, citing overall higher invoiced prices for Type II cement in the home market, petitioner contends that the Mexican consumers perceive a very real difference between cement types. Finally, petitioner submits that CEMEX cannot argue that ASTM standards for cement govern identical merchandise issues if it also claims that cement that meets more than one ASTM specification cannot be compared as identical merchandise in either of two appropriate ASTM categories.

DOC Position

We disagree with CEMEX. For merchandise comparisons, section 771(16)(A) of the Act states a clear preference for merchandise which is identical in physical characteristics to the merchandise sold in the United States. Throughout this investigation, both petitioner and CEMEX have noted that customers and producers in both markets rely on ASTM standards to differentiate between products. Furthermore, we note that the Mexican standards and the ASTM standards used in the United States are practically the same. Therefore, we have considered that if a product is sold as merchandise meeting a certain ASTM standard, and in fact the product meets that ASTM standard, it is identical in physical characteristics

to the merchandise sold in Mexico which meets, and is sold as meeting, the same standards.

We have used the invoice to determine the proper ASTM standard, because we verified that the product listed on the invoice met the ASTM standard indicated on the invoice. For example, cement invoiced as Type I cement met the Type I standard, even though it may have also met the Type II standard. We acknowledge that at verification we noted one instance where Type II cement was mistakenly invoiced as Type I cement. However, as the verification report also reveals, this was a mistake and is not the ordinary practice in the industry. Because producers label and sell cement, and customers buy cement based on these standards, we have determined that matching by ASTM standard as invoiced is the most reasonable basis for making equitable identical merchandise comparisons.

Comment 8

Petitioner claims that the Department should make an adjustment for differences in merchandise to account for the extra expense incurred by one CEMEX company for grinding cement. CEMEX argues that since the Department has determined that identical products exist, there is no need for difference in merchandise adjustments.

DOC Position

CEMEX's verified production records confirm that cement ground to slightly different levels of fineness may still meet the same ASTM standards and be sold as identical merchandise. Therefore, and for reasons explained in Comment 7, we have determined that all merchandise within a particular ASTM standard can be compared as identical without adjustments for differences in merchandise.

Comment 9

CEMEX argues that the Department's failure to compare sales at the same level of trade in its preliminary

determination is contrary to the antidumping statute and to the Department's regulations and practice. Petitioner contends that CEMEX's request regarding level of trade is untimely and thereby prevented proper verification. Furthermore, petitioner claims that in its preliminary determination the Department calculated FMV and U.S. price based on sales at the same level of trade.

DOC Position

For our final determination, we determined that CEMEX had sufficient sales in the home market at the same commercial level of trade as its U.S. sales to permit an adequate comparison to all U.S. sales.

However, information concerning level of trade submitted by Apasco and Cementos Hidalgo was not complete enough for us to determine the appropriate levels of trade for Apasco's and Cementos Hidalgo's merchandise comparisons. Therefore, we assumed that all home market sales of the physically identical merchandise were at the same level of trade.

Comment 10

Petitioner argues that CEMEX's shipments to the U.S. that were made during the POI pursuant to long-term Contract 1 should be included in the calculation of the U.S. price, because the material terms of the contract were not fixed until the date of shipment. Petitioner argues, among other things, that there was no definite price term.

CEMEX explains that it made sales to two regions in the United States pursuant to Contract 1 during the POI. CEMEX argues that the price and quantity terms for sales made to both regions were fixed in an oral agreement and a letter that preceded the POI. CEMEX argues that the price term was fixed because there was nothing further to negotiate after the oral agreement. Specifically, CEMEX argues that the formula used to calculate the price

for sales to Region 2 establishes a definite price term in accordance with Department precedent. CEMEX also argues that the quantity term was fixed, because the contract required CEMEX to supply all of its customer's annual requirements.

DOC Position

We disagree with CEMEX in part. In accordance with section 776 of the Act (19 U.S.C. 1677e), which requires the Department to verify all information used in making a final determination, we usually cannot rely upon oral agreements standing alone to establish the date of sale (*see,* Final Determination of Sales at Less than Fair Value: Certain Forged Steel Crankshafts from the Federal Republic of Germany, 52 FR 28,170 (1987)). Although we usually consider the date when the parties execute a long-term contract that establishes definite price and quantity terms as the date of sale (*see,* Final Determination of Sales at Less Than Fair Value: Fall-Harvested Round White Potatoes from Canada, 48 FR 51,669 (1983)), CEMEX presented no evidence during the investigation that established when the parties actually had signed long-term Contract 1. The Uniform Commercial Code, however, recognize [sic] the existence of a contract when the parties have begun performance pursuant to written instruments, such as letters, memoranda, company correspondences, and the like (see also, Certain Forged Steel Crankshafts from the Federal Republic of Germany, *supra*).

In this case, we verified for sales to Region 1 that the parties had begun performance pursuant to a letter agreement, dated before the POI, that establishes definite price and quantity terms. Because we determine under these circumstances that the parties had established definite price and quality terms for sales to Region 1 before the POI, we determine that the date of sale for these shipments precedes the POI. Accordingly, we have not included in our calculations shipments made to Region 1.

For sales to Region 2, however, we verified that the parties did not establish a definite price term before the POI, because a formula contained in the letter agreement noted above required one of the parties to enter into subsequent negotiations to establish the final selling price. Although CEMEX relinquished control over the final selling price after the sale of the subject merchandise to its customer, CEMEX's customer still maintained control over that price through negotiations with its own customers. Because the price term appearing in the letter agreement noted above is not established until CEMEX's customer concludes negotiations with its customers, that term is indefinite and, therefore, not sufficient to establish the date of sale. We consider the date of shipment to be the date of sale under these circumstances and have included in our calculations all shipments that CEMEX made to Region 2 during the POI.

We also disagree with CEMEX's argument that the contract formula used to calculate price for sales to Region 2 establishes a definite price term in accordance with our administrative precedent. In contrast to formulas found to establish a definite price term, CEMEX's formula is not pegged to some external event that would make unnecessary further negotiations by either party to the contract. *See*, Final Determination of Sales at Less than Fair Value: Brass Sheet and Strip from France, 52 FR 812 (1987) (publicly quoted price list); *Voss International Corp.* v. *United States*, 628 F. 2d 1328 (CCPA 1980) (peg to world market prices); *Final Determination of Sales at Less Than Fair Value: Frozen Concentrated Orange Juice from Brazil*, 52 FR 8324 (1989) (peg to commodity prices).

Comment 11

Petitioner argues that CEMEX's shipments to the U.S. that were made during the POI pursuant to Contract 2 should be included in the calculation of U.S. price. Petitioner argues that although Contract 2 s a minimum

quantity contract, and CEMEX agrees that all shipments made during the POI in excess of the minimum quantity should be reported, there is no indication when the minimum quantity was met. Therefore, all shipments made during the POI should be included in the calculation of U.S. price.

CEMEX argues that the Department verified CEMEX had supplied its customer with the quantity stipulated in the purchase agreement. Therefore, only shipments made during the POI that exceed the minimum amount stated in Contract 2 should be included in the calculation of U.S. price.

DOC Position

Where a minimum quantity contract is involved, we consider the date when the parties executed (*i.e.* signed) the contract to be the date of sale for those sales made up to the minimum quantity. *See*, Titanium Sponge from Japan: Final Determination of Antidumping Duty Administrative Review and Tentative Determination to Revoke in Part, 54 FR 13,403 (1989). For sales made in excess of the minimum quantity, we consider the date of purchase order or the date of shipment to be the date of sale (*Id.*). The rationale underlying this different treatment is that neither the seller not [sic] the buyer knows at the time of contract formation the actual quantity to be supplied or purchased above the minimum quantity requirement (*Id.*).

In this case, we verified that although there was no evidence that specified the date when the parties had signed the written purchase agreement, which establishes definite price and minimum quantity terms, the parties had begun performance pursuant to this agreement before the POI. We also verified that the parties had adhered to the minimum quantity term contained in this purchase agreement. We consider the price and the minimum quantity terms to have been established before the POI under these

circumstances. As a result, we determine that the date of sale for shipments made up to the minimum quantity specified in the written purchase agreement precedes the POI. Accordingly, we have not included such sales in our calculations. However, we have included in our calculations shipments made in excess of the minimum quantity.

Comment 12

Petitioner argues that all shipments to the U.S. made pursuant to Contracts 3 and 4 should be included in the calculation of U.S. price, even those shipments made after the POI. Petitioner argues that the date of sale for these contracts falls within the POI and, thus, all shipments made pursuant to these contracts should be used in the calculation of U.S. price. Alternatively, petitioner argues that there was never a binding commitment, as shown by the fact that the guaranteed quantities were not adhered to and, thus, the date of sale could be considered to be the date of shipment. In this case, only those shipments made during the POI pursuant to these contracts should be included in the calculation of U.S. price.

CEMEX argues that the date of sale for shipments made pursuant to Contract 3 during the period April 1, 1989—June 30, 1989, fall outside the POI, because the price and quantity terms for such shipments were reached in an oral agreement that occurred before the POI. CEMEX agrees that shipments from July 1 through December 31, 1989, should be included in the calculation of U.S. price, because the date when the price was established for these shipments fell within the POI. CEMEX further argues that the fact that the minimum quantity was not reached is irrelevant, because there was clear intent by the parties to adhere to the minimum quantities.

For Contract 4, CEMEX argues that the price terms were agreed to on a date that precedes the POI. CEMEX also argues that the quantity terms were agreed to during the prior year.

DOC Position

We agree with CEMEX's position regarding Contract 3. We verified that the parties had begun performance pursuant to a letter agreement, dated before the POI, that established definite price and minimum quantity terms. Although it is unclear when the parties signed this letter agreement, we consider the price and minimum quantity terms, as set forth in this agreement, to have been established before the POI, because the parties had begun performance pursuant to this agreement before the POI. Furthermore, that the parties did not adhere to the minimum quantity terms during performance of the contract does not invalidate their intent to establish definite quantity terms as set forth in the letter agreement. As a result, we consider the date of sale for shipments made up to the minimum quantity during the period April 1, 1989 through June 30, 1989, to precede the PIO [sic]. We, therefore, have not included these sales in our calculations.

We disagree with CEMEX's position regarding Contract 4. CEMEX explained at verification that the parties were adhering to the price and quantity terms of a 1988 purchase agreement during the period July 1, 1989 through March 31, 1989. On April 1, 1989, the parties began performance pursuant to a written amendment to the 1988 purchase agreement that establishes new price and quantity terms. Because the parties established definite price and quantity terms pursuant to this amendment during the POI, we consider the date of sale for Contract 4 to fall within the POI. Accordingly, we have included in our calculations all shipments made pursuant to this contract.

Comment 13

Petitioner argues that sales pursuant to CDC Contract 1 should be included in our calculations because the minimum quantity was not met. Petitioner argues that sales made pursuant to CDC's longterm Contract 2 should

be included in the POI because there was no definite price term established by a memorandum dated prior to the POI. CEMEX argues that this memorandum did, in fact, establish a definite price term and, thus, only those shipments above the minimum quantity stated in the contract should be included in the POI.

DOC Position

We agree with CEMEX. We verified that the parties had formally executed Contract 1 before the POI. We have not included sales pursuant to Contract 1 in our calculations because we have determined that the parties established definite price and quantity terms before the POI. Furthermore, that the parties did not adhere to the quantity terms during performance of the contract does not void their intent to establish definite quantity terms at the time of contract formation (*see,* Comment 12).

For Contract 2, we verified that the memorandum dated prior to the POI establishes a definite price term and simply extended a long-term contract executed by the parties well before the POI. As a result, we consider the date of sale for shipments made pursuant to CDC's Contract 2 to precede the POI. Accordingly, we have not included such sales in our calculations.

Comment 14

CEMEX contends that because a contract with one of Tolteca's customers was executed prior to the POI, sales pursuant to this contract should not be considered in the Department's final determination.

DOC Position

We agree with CEMEX. We verified that the parties had established definite price and quantity terms prior to the POI pursuant to this contract. As a result, we have not included in our calculations sales made pursuant to this contract.

Comment 15

Petitioner contends that since Apasco cannot establish the exact date when Contract 1 was executed (*i.e.*, signed), the Department should use best information available to determine the U.S. price for Apasco's shipments after the POI. Apasco argues that its methodology for determining the date of sale is in accordance with the Department's original questionnaire.

DOC Position

We agree with Apasco. Although the purchase agreement for Contract 1 failed to specify the date when the parties had formally executed (*i.e.*, signed) the contract, we verified that the parties had begun performance pursuant to this purchase agreement, which establishes definite price and quantity terms, before the POI. As a result, we consider the date of sale of Contract 1 to precede the POI and have excluded from our calculations shipments made pursuant to that contract.

Comment 16

Petitioner claims that the U.S. price for sales to the United States pursuant to the long term contracts differs from that reflected on the source documents. CEMEX argues that the gross unit prices reported are correct and that petitioner is confused by a line labeled "exfactory price" on the source documents.

DOC Position

We verified that the amounts reported were correct, and thus no changes to the reported U.S. prices were made in our final calculations of fair market value.

Comment 17

Petitioner argues that since there were two VAT rates applicable in Mexico during the POI, the Department

should use the 6 percent rate which was applicable for sales in border zones. Petitioner argues that for overland shipments to the United States, the 6 percent border zone VAT rate should apply because the export sale would have incurred a 6 percent VAT had it been sold in the border zone before crossing the border. CEMEX argues that the 15 percent VAT rate should be used in calculating VAT on export sales since this is the rate used in virtually all areas of Mexico.

DOC Position

The adjustment for VAT is intended to reflect the tax on home market sales. We found that the 15 percent rate applies to almost all of the home market destinations, and the vast majority of CEMEX's home market sales incurred VAT at the 15 percent rate. Therefore, we have determined that the 15 percent rate is the rate which most closely represents the actual VAT experience in the home market.

Comment 18

Petitioner notes that VAT was improperly double counted on CDC's computer tape.

DOC Position

We agree. CEMEX submitted a new computer tape that contains the verified amounts for CDC's VAT. We have used this revised tape for our final determination.

Comment 19

Petitioner claims that Apasco's claim for duty drawback on refractory bricks and grinding balls should be denied, because these products are not inputs in the subject merchandise. Furthermore, petitioner argues that the replacement of the bricks and balls represents a capital expense which cannot be apportioned by a simple formula.

Apasco maintains that ground clinker obviously contains portions of refractory bricks and grinding balls. Apasco also states that the Department has verified that it received duty drawback.

DOC Position

We agree with Apasco. We verified that Mexican import duties paid by Apasco for refractory bricks and grinding balls used in producing cement were rebated by reason of exportation of the subject merchandise. Therefore, we have allowed Apasco's claim for duty drawback.

Comment 20

Petitioner contends that countervailing duty cash deposits paid or reimbursed by Apasco should be deducted from U.S. price. Apasco points out that the Act provides only that U.S. price be increased by the amount of countervailing duties imposed on the merchandise. Therefore, because no duty has been imposed, Apasco argues that actual duties can be only added to U.S. price once the final duty amount is established.

DOD [sic] *Position*

We agree with Apasco. Section 772(d)(1)(D) of the Act authorizes the Department to make an addition to U.S. price for any countervailing duties imposed (i.e., assessed) on the subject merchandise (19 U.S.C. 1677a (d)(1)(D); *Serampore Industries Pvt., Ltd.* v. *United States*, 675 F.Supp. 1354 (1987)). In this case, the subject merchandise will not be subject to the imposition of simultaneous countervailing duties and antidumping duties until the Department completes any future administrative reviews. Therefore, no adjustment to U.S. price is warranted at this time.

In accordance with Article VI.5 of the General Agreement on Tariffs and Trade, however, it is the Depart-

ment's consistent practice to deduct the amount of the export subsidy from the dumping deposit when final countervailing duty and antidumping orders are in effect (see, Final Determination of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 FR 18992, 19092 (1984) [sic]. Therefore, if the Department publishes an antidumping duty order in this case, the Department will instruct the U.S. Customs Service to reduce the dumping deposit by the countervailing duty deposit attributable to the export subsidy found in the most recent countervailing duty administrative review covering the subject merchandise (see, Final Results of Countervailing Duty Administrative Review: Portland Hydraulic Cement and Cement Clinker from Mexico, 53 FR 18325 (1988)).

Comment 21

Petitioner argues that CEMEX's home market sales to related parties should be included in the calculation of FMV if they are at prices equal to or greater than the prices charged to unrelated customers.

DOC Position

We agree. In accordance with 19 CFR 353.45(a), we have included home market sales to related parties because they were at or above the prices charged to unrelated customers.

Comment 22

Petitioner argues that for CEMEX and Apasco the Department should follow its practice of disallowing discounts and rebates to related home market purchasers. CEMEX argues that if the Department includes sales to related parties in its calculation of FMV, it should also include discounts and rebates to related customers as well.

DOC Position

We agree with CEMEX. In determining whether to use related party transactions in the home market for fair value comparisons we compared the prices to related parties, net of all rebates and discounts, to the prices to unrelated parties, net of all discounts and rebates. For CEMEX, we determined that such net prices to related parties are at, or greater than, the net prices to unrelated parties. Therefore, in our calculations to determine foreign market value for CEMEX, we have likewise deducted all discounts and rebates from the prices to both related and unrelated parties.

For Apasco, we determined that such net prices to related parties are less than the net prices to unrelated parties. Therefore, we have not included sales to related parties in our calculations to determine foreign market value for Apasco.

Comment 23

Petitioner argues that CEMEX's ESP sales must be reduced by the increased amount of discounts and rebates found at verification. CEMEX claims that the discounts and rebates were reported accurately. There was a slight difference between the reported amounts and the company records, but CEMEX claims that the difference was due to quantity adjustments and to discounts and rebates for products not used in the calculation of U.S. price.

DOC Position

We agree [with] CEMEX. The difference found was negligible, and thus we have made no additional adjustments.

Comment 24

Petitioner argues that the Department should not allow any deductions for discounts and rebates for CEMEX's

home market sales where the customers purchase pozzolanic cement as well as Types I and II cement, because CEMEX has not reported sales of pozzolanic cement and has not explained how the discounts and rebates have been allocated. CEMEX claims that the allocation method, which was verified by the Department, was accurate.

DOC Position

We agree with CEMEX. We verified that the allocation method was accurate and, thus, have allowed the claimed adjustment.

Comment 25

Apasco claimed that a commission was paid to a related party on U.S. sales. Petitioner claims that the Department should deduct this commission. Apasco argues that it has established that the commissionaire is related to Apasco and that the commission therefore represents simply an intracorporate transfer.

DOC Position

We verified Apasco's submission regarding corporate structure, including the relationship of the commissionaire. We are not deducting the related party commission from U.S. price, because we consider it to be an intracorporate transfer. Likewise, in none of the sales used to establish FMV did we make an allowance for commissions paid to related parties.

Comment 26

Petitioner argues that the Department should deduct all movement charges from U.S. price, as well as brokerage and handling fees for all U.S. sales by CDC. Petitioner also argues that the Department must recalculate U.S. packing costs for BCW, one of CEMEX's U.S. affiliates, so that such costs represents the packing costs as verified by the Department.

DOC Position

We agree with petitioner and have deducted all movement charges, as well, [sic] as brokerage and handling fees, for all U.S. sales by CDC. We have used the revised packing costs submitted by CEMEX in our calculations, because these packing costs represent the amounts we verified.

Comment 27

Petitioner notes that the law makes no provision for deducting foreign inland freight from FMV and that inland freight on certain home market sales by CEMEX and Apasco was incurred prior to the date of sales. Therefore, petitioner asserts that home market inland freight that appears to be incurred before the date of sale should not be deducted from the FMV.

CEMEX and Apasco argues that, consistent with two court cases (see, *AOC International, Inc., et al. v. United States*, Slip Op. 89-127 (CIT, September 18, 1989) and *Smith-Corona Group, SCM Corp. v. U.S.* 713 F.2d 1568, 1572 (CAFC, 1983)), inland freight charges should be deducted from both U.S. price and FMV because it is the only way to make an "apples-to-apples" comparison.

DOC Position

We agree with CEMEX and Apasco. We have deducted from the U.S. price inland freight which represents movement expenses from the plant to the storage facility. Therefore, to ensure an "apples-to-apples" comparison, we have deducted movement expenses from the plant to the storage pick-up point on home market sales in our determination of FMV.

Comment 28

Petitioner contends that inland freight charges billed by a related freight company should be allowed only if they represent arms-length transactions. Apasco maintains that the rates charged Apasco by the related freight

company were compared with those of an unrelated supplier and deemed to be at arm's length.

DOC Position

We agree with Apasco. We have verified that the freight price charged Apasco by the related company is at least as much as that charged by unrelated suppliers and, therefore, was at arm's length. As a result, we have used the related party freight charges.

Comment 29

Petitioner claims that, as best information, the Department should recalculate Apasco's claim for insurance to account for the expected rebate of a portion of the premiums paid during the POI. Apasco argues that the Department has verified information concerning insurance and, therefore, need not use best information available.

DOC Position

As noted in the verification report, Apasco was unable to document rebate of insurance premiums. Furthermore, the effect of adjusting for the expected rebate would be negligible. Therefore, we have made no adjustments to Apasco's claim for insurance.

Comment 30

Petitioner maintains that CEMEX's credit expense on ESP sales should be based on the home market interest rate because CEMEX's U.S. subsidiaries did not borrow money in the U.S. Petitioner further argues that since CEMEX had both peso- and dollar-denominated debt, credit expense for purchase price sales should be calculated based on either CEMEX's interest rate for peso-denominated debt or the average of CEMEX's peso and dollar interest rates.

CEMEX argues that the peso interest rate reflects a factor to compensate for inflation in Mexico and that this

factor is irrelevant to the opportunity cost of holding accounts receivable on dollar-denominated sales. Therefore, the dollar interest rate paid by CEMEX should apply to its dollars-denominated sales.

DOC Position

We disagree with petitioner. In order to calculate credit costs, we seek to determine a respondent's actual borrowing experience. Because CEMEX received U.S. dollar-denominated loans during the POI, we used CEMEX's dollar-denominated interest rate to calculate credit costs for CEMEX's purchase price and ESP sales. This position is consistent with our long-standing administrative practice. See, Porcelain-on-Steel-Cooking Ware from Mexico; Final Results of Antidumping Duty Administrative Review 55 FR 21061 (1990).

[*Comment 31*]

For a small number of purchase price sales, CEMEX received partial, rather than full, payment. Petitioner proposes that the Department reduce U.S. price by the highest percentage that the amount received by CEMEX fell short of an invoiced amount. CEMEX states that prior to verification, it notified the Department in writing that these transactions had not been paid and provided the Department with complete and accurate information.

DOC Position

For the transaction where full payment had not been received, we calculated credit expenses using CEMEX's data on the highest average number of days accounts were outstanding for the CEMEX affiliates with purchase price sales. We consider this methodology to be a reasonable representation of credit experience and have used it as best information in our final determination.

Comment 32

Petitioner contends that the basis for calculating U.S. inventory carrying costs should include the total cost for the U.S. affiliate to purchase the cement, in addition to transportation costs incurred to transport the cement to the terminal. Petitioner argues that because CEMEX did not report when the merchandise entered into the inventories of its U.S. affiliates, as best information available, the Department should use the time between the date of production and the date of sale to the first unrelated purchaser to calculate the time that the cement remained in U.S. inventory. Petitioner further claims that since CEMEX's U.S. affiliates do not borrow money in the U.S., and CEMEX has not claimed that it maintains separate accounts for dollar and peso loans, the Department should recalculate CEMEX's inventory carrying costs using the average of CEMEX's peso and dollar interest rates.

CEMEX submits that it has reported the time inventory destined for the U.S. market was held in Mexico and the time it was held in the United States. Finally, CEMEX argues that using a foreign currency denominated rate for the time inventory is owned by a U.S. subsidiary makes sense only when a dollar rate is not available.

DOC Position

We found that CEMEX borrows in both dollars and pesos. Therefore, we have adhered to the Department's standard practice which is explained below to calculate the inventory carrying cost. In this case, for the period between production and entry into the United States, we have used the home market weighted average short term interest rate reported by CEMEX. For the period from entry into the United States until sale to the first unrelated party, we have used the verified U.S. interest rate. Based on CEMEX's corporate organization and record keeping, we consider merchandise to enter the inventory of the U.S. subsidiary when it crosses the U.S. border. We used

the transfer price reported by CEMEX as the basis for the calculation.

Comment 33

We found at verification that Cementos Hidalgo incurs a bank charge on both home market and U.S. sales for checks issued outside the Monterrey metropolitan area, as well as for exchanging dollars to pesos. Petitioner argues that the Department should deduct the unreported bank charge on U.S. sales but not the unreported bank charge on home market sales. Petitioner argues that we should apply the highest bank fee rate verified to all U.S. sales as best information available.

DOC Position

We agree. As best information available, we have applied the highest verified bank fee rate to all U.S. sales and have not deducted the bank fee from the home market sales because Cementos Hidalgo did not report this fee, and we do not know to which sales the fee would apply.

Comment 34

Petitioner argues that the Department should increase the credit expense on all Cementos Hidalgo's U.S. sales because the reported credit days were inaccurate for all the sales examined during verification. As best information available, petitioner suggests that the Department use the longest period of time verified for all sales. Petitioner also argues that Cementos Hidalgo's home market credit expense should be denied because it did not use actual credit days in its calculation.

DOC Position

We agree that the U.S. credit expense should be increased for all U.S. sales. We found at verification that the number of days for which credit was extended was under-

reported on all U.S. sales. Therefore, in our calculations, we used the verified number of credit days for the sales which we verified. As best information available, we used the average credit period of the verified sales for the credit calculation of all other U.S. sales. With regard to the home market credit expense, we disagree with petitioner. Use of an average payment period is acceptable if it is not possible, or if it is too complex, to report actual payment days. We have determined in this case that the use of an average payment period on home market sales is acceptable, because it was too complex to report actual payment days due to the number of home market sales.

Comment 35

Petitioner argues that the Department should disallow Apasco's claimed adjustment for costs incurred as a result of maintaining portable silos at the sites of construction company customers. Petitioner claims that silo maintenance, which constituted all of the claim, was not part of the negotiated price with these customers. Furthermore, petitioner claims that Apasco has not shown that maintenance expenses arose from the use of cement sold during the POI. Apasco maintains that the record verified by the Department clearly establishes the link between the maintenance expenses and the sales during the POI.

DOC Position

We have allowed Apasco's claim for post-sale silo maintenance expenses to home market customers since it is an essential term of the sales. Moreover, based on Apasco's records, we find that it would be unreasonable, if not impossible, to precisely tie its maintenance expenses directly to cement sold in the POI. Therefore, we have accepted Apasco's allocation methodology.

Comment 36

Petitioner argues that Apasco's claim for a circumstance of sale adjustment for technical services should be

disallowed because the technical services are not directly related to sales during the POI. In particular, petitioner cites Apasco's claim that home market technical services were for seminars. Citing the court's ruling in *Rhone Poulenc S.S.* v. *United States,* 592 F. Supp. 1318, 1335 (CIT 1984), petitioner maintains that seminars are generally for promoting good will and future sales and, as such, do not constitute technical services for independent services. Apasco proposes that the Department treat technical services equally in both markets.

DOC Position

We verified that Apasco incurred expenses for seminars which they claimed as a circumstance of sale adjustment for technical services. Since we found no evidence in either market of requests from customers for technical services, and since Apasco was not able to show that the customer visits were made at the request of the customers, we deem the claimed technical service expenses in both markets to have been generally oriented toward promoting good will and future sales, and, as such, are not directly related to the sale of the subject merchandise. Therefore, we are denying Apasco's claimed adjustment for technical services.

Continuation of Suspension of Liquidation

In accordance with section 733(d)(1) of the Act, we are directing the U.S. Customs Service to continue the suspension of liquidation of all entries of gray portland cement and clinker from Mexico as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after April 12, 1990, the date of publication of the preliminary determination in the Federal Register. The U.S. Customs Service shall continue to require a cash deposit or posting of a bond equal to the estimated amount by

which the FMV of the subject merchandise from Mexico exceed the U.S. price, as shown below.

Manufacturer/Producer/Exporter	Margin percentage
CEMEX, S.A.	58.38
Apasco, S.A. de C.V.	53.26
Cementos Hidalgo, S.C.L.	3.69
All others	58.05

If the Department publishes an antidumping duty order covering the subject merchandise, the Department will instruct the U.S. Customs Service to reduce the dumping deposit by the amount of the countervailing duty deposit attributable to the export subsidies found in the most recent countervailing duty administrative review covering the subject merchandise. *See, Portland Hydraulic Cement and Cement Clinker from Mexico, supra.* This suspension of liquidation will remain in effect until further notice.

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination. In addition, pursuant to section 735(c)(1) of the Act, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Deputy Assistant Secretary for Investigations, Import Administration.

The ITC will determine within 45 days from the date of this final determination whether there is material injury, or the threat thereof, to the domestic industry. If

the ITC determines that material injury, or threat of material injury, does not exist, the proceeding will be terminated and all securities posted as a result of the suspension of liquidation will be refunded or cancelled. However, if the ITC determines that material injury does exist, the Department will issue an antidumping duty order directing Customs officials to assess antidumping duties on gray portland cement and clinker from Mexico entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, equal to the amount by which the FMV exceeds the U.S. price.

This determination is published pursuant to section 735 (d) of the Act (19 U.S.C. 1673d(d)).

Dated: July 10, 1990.

Francis J. Sailer,

Acting Assistant Secretary for Import Administration.

[FR Doc. 90-16693 Filed 7-17-90; 8:45 am]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1239

THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee,

CEMEX, S.A.,
Defendant-Appellee,

and

APASCO, S.A. DE C.V.,
Defendant-Appellee.

ORDER

Before MAYER, Circuit Judge, LOURIE, Circuit Judge, and LAY, Senior Judge.

A petition for rehearing having been filed by APPELLEE Cemex, S.A., and responses thereto having been invited by the court and filed by APPELLANT The Ad Hoc Committee and APPELLEE The United States,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate will issue March 8, 1994.

FOR THE COURT

FRANCIS X. GINDHART
Clerk

by /s/ Diane M. Frye
DIANE M. FRYE
Chief Deputy Clerk

Dated: March 1, 1994

[Filed Mar. 1, 1994]

cc: Martin M. McNerney
A. David Lafer
Joseph H. Blatchford
Irvin [sic] P. Altschuler

STATUTES INVOLVED

§ 1677a. United States price

(a) United States price.—For purposes of this subtitle, the term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.

(b) Purchase price.

For purposes of this section, the term "purchase price" means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the mechandise for exportation to the United States. Appropriate adjustments for costs and expenses under subsection (d) of this section shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.

(c) Exporter's sales price.—For purposes of this section, the term "exporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporters, as adjusted under subsections (d) and (e) of this section.

(d) Adjustments to purchase price and exporter's sales price.—The purchase price and the exporter's sales price shall be adjusted by being—

(1) increased by—

(A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States,

(B) the amount of any import duties imposed by the country of exportation which have been

rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States;

(C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and

(D) the amount of any countervailing duty imposed on the merchandise under part I of this subtitle or section 1303 of this title to offset an export subsidy, and

(2) reduced by—

(A) except as provided in paragraph (1)(D), the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and

(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the country of exportation on the exportation of the merchandise to the United States other than an export tax, duty, or other charge described in section 1677(6)(C) of this title.

(e) Additional adjustments to exporter's sales price.—For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

(1) commissions for selling in the United States the particular merchandise under consideration,

(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and

(3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

§ 1677b. Foreign market value

(a) Determination; fictitious market, sales agencies

For purposes of this subtitle—

(1) In general

The foreign market value of imported merchandise shall be the price, at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported to any other person who is not described in subsection (e)(3) of this section with respect to such person—

(A) at which such or similar merchandise is sold, or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade for home consumption, or

(B) if not so sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other

than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States,

increased by, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of importation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this subtitle no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

(2) Use of constructed value

If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that merchandise, as determined under subsection (e) of this section.

(3) Indirect sales and offers for sale

If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 1677(13) of this title, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value.

(4) Other adjustments

In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—

(A) the fact that the commercial quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale, for exportation to, or in the principal markets of, the United States, as appropriate, in the ordinary course of trade, are less or are greater than the commercial quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale, in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or if not so sold for home consumption, then for exportation to countries other than the United States);

(B) other differences in circumstances of sale; or

(C) the fact that merchandise described in paragraph (B) or (C) of section 1677(16) of this title is used in determining foreign market value,

then due allowance shall be made therefor.

(5) Fictitious markets

The occurrence of different movements in the prices at which different forms of any merchandise subject to an antidumping duty order issued under this subtitle are sold (or, in the absence of sales, offered for sale) after the issuance of such order in the principal markets of the foreign country from

which the merchandise is exported may be considered by the administering authority as evidence of the establishment of a fictitious market for the merchandise if the movement in such prices appears to reduce the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise.

ANTIDUMPING ACT—AMENDMENT

Public Law 85-630; 72 STAT. 583 (1958)

Sec. 2. Subsections (b) and (c) of section 202 of the Antidumping Act, 1921 (19 U.S.C. 161(b) and (c)), are amended to read as follows:

"(b) In determining the foreign market value for the purposes of subsection (a), if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the purchase price and the foreign market value (or that the fact that the purchase price is the same as the foreign market value) is wholly or partly due to—

> "(1) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale for exportation to the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),
>
> "(2) other differences in circumstances of sale, or
>
> "(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 212(3) is used in determining foreign market value,

then due allowance shall be made therefor.

"(c) In determining the foreign market value for the purposes of subsection (a), if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the exporter's sales price and the foreign market value, or that the fact that the exporter's

sales price is the same as the foreign market value, is wholly or partly due to—

"(1) the fact that the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),

"(2) other differences in circumstances of sale, or

"(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 212(3) is used in determining foreign market value,

then due allowance shall be made therefor."

Sec. 3. The heading and text of section 205 of the Antidumping Act, 1921 (19 U.S.C. 164), are amended to read as follows:

"FOREIGN MARKET VALUE["]

"Sec. 205. For the purposes of this title, the foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, or if the Secretary determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation

to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States), plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account. If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 207, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value."

Antidumping Act of 1921
Ch. 14, 42 Stat. 11 (1921)

SPECIAL DUMPING DUTY.

SEC 202. (a) That in the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary has made public a finding as provided in section 201, and as to which the appraiser or person acting as appraiser has made no appraisement report to the collector before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the cost of production) there shall be levied, collected, and paid, in addition to the duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

(b) If it is established to the satisfaction of the appraising officers that the amount of such difference between the purchase price and the foreign market value is wholly or partly due to the fact that the wholesale quantities, in which such or similar merchandise is sold or freely offered for sale to all purchasers for exportation to the United States in the ordinary course of trade, are greater than the wholesale quantities in which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States), then due allowance shall be made therefor in determining the foreign market value for the purposes of this section.

(c) If it is established to the satisfaction of the appraising officers that the amount of such difference between the exporter's sales price and the foreign market value is wholly or partly due to the fact that the wholesale quantities, in which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the

United States in the ordinary course of trade, are greater than the wholesale quantities in which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States), then due allowance shall be made therefor in determining the foreign market value for the purposes of this section.

PURCHASE PRICE.

SEC. 203. That for the purposes of this title, the purchase price of imported merchandise shall be the price at which such merchandise has been purchased or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and plus the amount, if not included in such price, of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

EXPORTER'S SALES PRICE.

SEC. 204. That for the purpose of this title the exporter's sales price of imported merchandise shall be the price at which such merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the acount of the exporters, plus when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less (1) the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States, (2) the amount of the commissions, if any, for selling in the United States the particular merchandise under consideration, (3) an amount equal to the expenses, if any, generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and (4) the amount of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

FOREIGN MARKET VALUE.

SEC. 205. That for the purposes of this title the foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the

United States, at which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States), plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this title, no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

Hearings Before the Committee on Ways and Means, U.S. House of Representatives, on H.R. 6006, 6007 and 5120, July 30, 1957.

Report Of the Secretary Of the Treasury To the Congress On the Operation and Effectiveness Of Antidumping Act and On Amendments To the Act Considered Desirable Or Necessary.

PART I. OPERATION

The Antidumping Act—A Technical Explanation

The Antidumping Act was originally enacted as sections 201-212, 406, 407, law of May 27, 1921 (42 Stat. 11-15, 18). It has been substantially amended once by the Customs Simplification Act of 1954 (68 Stat. 1138-1139). It is published in title 19, United States Code, sections 160-173 (1952 edition, secs. 161(b)-173; supplement III to 1952 edition, sec. 160-161 (a)).

The Antidumping Act employs certain terms which have highly specialized meanings. These terms are referred to in the body of this summary in quotation marks, and a glossary is given at the conclusion in annex A.

Finding of Dumping Under the Antidumping Act

The Antidumping Act provides that a "finding" shall be made when it has been established that:

(*a*) Foreign merchandise is, or is likely to be, sold to the United States market at a price less than "fair value," and

(*b*) An American industry is, or is likely to be, injured, or is prevented from being established, because of importation of such merchandise to the United States.

The Treasury Department determines whether there are sales at less than "fair value." If the Treasury's investigation shows that there have been sales at less than "fair value" then, and not until then, the case is referred to the United States Tariff Commission which decides the question of injury. If the Tariff Commission determines

that there is injury, a finding is announced and dumping duties are thereupon assessed.

Calculation of Sales at Less Than "Fair Value"

It has been pointed out that the first step in making a finding under the Antidumping Act is determination by the Treasury of sales of foreign merchandise to the United States at less than "fair value."

Definition of "fair value"

The term "fair value" is not defined in the act. It is defined in Customs Regulations, section 14.7 (19 C.F.R. 14.7). This definition ordinarily bases "fair value" simply on sales for home consumption in the producer's country, but bases it on sales otherwise than for exportation to the United States, i.e., sales for home consumption and to third countries, where the quantity of home consumption sales is so small as to furnish an inadequate basis for comparison. In addition, the regulations provide for calculating any one foreign producer's "fair value" by reference to prices charged by other foreign producers for similar merchandise when access to that foreign producer's records is not feasible, or where the information obtained from that foreign producer is insufficient or inadequate. If adequate information is not available as to home consumption or third country prices, "fair value" is based on cost of production.[1] In the discussion that follows it will ordinarily be assumed for purposes of simplification, that there is a sufficient volume of home consumption sales to use them as the basis for "fair value."

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[1] Accounting methods among countries and among companies within any given country vary widely, and it is almost universally agreed that prices actually charged or offered are a far better measure of value than any attempt to calculate material costs, labor, overhead, and profit for any given product. Accordingly it can be said that calculation of "cost of production" as a method for computing the basis for dumping price is generally warranted only as a last resort.

Comparison between "fair value" and price to the United States market

In considering whether there have been sales at less than "fair value," the price at which sales have been made to the United States market is compared with the figure thus calculated to be the "fair value." In making the comparison, it is necessary to reduce the two prices to comparable terms. In its simplest form the calculation can ordinarily be made by taking the f.o.b. factory price, in each case for the sale to the United States market and for the home consumption sale. A typical price comparison could be worked out as follows, assuming the United States importer to be in Pittsburgh, Pa., United States.

Home consumption price in country of export:		
Price, delivered to purchaser		$1.10
Less: Transportation from factory to purchaser		.05
Price f.o.b. factory		1.05
Price to the United States market:		
Price, delivered Pittsburgh		1.10
Less:		
Transportation from factory to export port	$0.05	
Ocean transportation	.15	
Transportation, United States port to Pittsburgh	.05	
United States import duties	.10	.35
		.75
Computation:		
Home consumption price		1.05
Price to United States		.75
Difference		.30

Facts such as these typically present a case for determination of sales at less than "fair value."

General Accounting Office Report to Congress
Administration of the
U.S. Antidumping Act of 1921

March 15, 1979

Circumstances of sale

Fair value comparisons are further complicated by disagreements over the identification and treatment of allowances arising from differences in commercial practices. Representatives of various industries in Europe, Canada, Japan, and Australia complained that U.S. legislation and regulations did not consider modern international business practices. In particular, controversy has developed over two aspects of Treasury regulations, which provide that:

—"differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration; and,

—"in making comparisons using exporter's sales price, reasonable allowance will be made for actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States."

The representatives said that these regulations do not adequately consider possible cost differences between the domestic and foreign markets for advertising, distribution, and other selling and marketing expenses. The provision that cost be directly related to the sale under consideration does not make allowances for such things as salaries and expenses of sales staff, maintenance of distribution centers, most advertising costs, etc.; thus, the foreign market value is overstated. This is particularly controversial because an unrelated importer will usually purchase merchandise at the factory price plus factory profit and per-

haps free-on-board costs, as illustrated by assumed costs and prices in the the example below.

Ex-factory cost	$100
Profit	5
Foreign inland freight	2
	107
Ocean freight duties	5
Total landed price	$112

Consider that the foreign producer, in marketing a product in the home market, incurs:

Ex-factory cost	$100
Profit	5
Foreign inland freight	2
	a/107
Sales staff	1
Commissions	1
Advertising	3
Distribution	2
Final sales price	$114

a/Producer's sales price and importer's purchase price.

The home market value is established by deducting from the $114 only those costs directly related to the sale, in this case, the $1 in direct sales commissions, which leaves a relatively high home market value of $113. The importer's total landed price is reduced to allow for transportation and duties. Treasury then compares the home market "fair value" price with the importer's purchase price, as illustrated below:

	Home market (Producer)	Export market (Importer)
Final sales price	$114	$112
Less commissions	–1	
Less:	113	112
Foreign inland freight	–2	–2
Ocean freight/duties		–5
Prices for comparison	$111	$105

When calculations are made on the basis of the exporter's sales price (related importer), allowances for selling costs are made only up to the dollar value of the selling costs for the same products in the U.S. market. The exporter's sales price is defined by Treasury as the factory price plus or minus profits or losses for both the factory and the U.S. affiliate plus transportation costs, as shown below.

	Home market (Producer)	Export market (Importer)
Ex-factory cost	$100	$100
Factory Profit	2	2
Affiliate Profit		2
	$102	$104
Transportation	1	1
Duties		5
Selling expense	10	3
Final sales price	$113	$113

Based on these assumptions, the home market price and the export market price (to the first unrelated buyer) is the same—$113.

To determine the costs of marketing the product, Treasury reduces the exporter's sales price for expenses incurred by the importer in selling to an unrelated purchaser; the home market price is also reduced up to the same dollar value. Assuming that both the producer and

the importer incur marketing costs of $10 and $3, respectively, the following calculations are made.

	Home market (Producer)	Export market (Importer)
Final sales price	$113	$113
Selling expenses	–3	–3
Transportation	–1	–1
Duties		–5
Total deductions	–4	–9
Prices for comparison	$109	$104

If the producer's full marketing costs of $10 were allowed, the home market value would be $102 and no dumping margin would be indicated. To the extent that prices in the home (or third country) market are higher by virtue of higher fixed expenses, there will be better opportunity for finding dumping margins. Foreign business interests complain that fair value calculations made in this manner do not recognize that costs of doing business can be higher in foreign countries than in the United States.

Customs officials told us that expenses for marketing, advertising, etc., incurred for a particular sale are generally allowable adjustments to the home or third-market price; expenses incurred prior to the sale or which would have been incurred whether or not the sale was made are not allowed. The officials explained that basically they look at the function or service performed in determining allowable adjustments. Potentially allowable adjustments include guarantees, provision of technical assistance and servicing, and differences in credit terms and commissions. Adjustments which are routinely disallowed include rents, utilities, office supplies, salaries and wages, and fringe benefits. The line between allowed and disallowed adjustments, then, is drawn roughly between fixed and variable costs to a producers [sic]. (See app. III.)

Adjustments for circumstances of sale are quantified on the basis of the cost to the seller. Although Customs regulations provide that, where appropriate, the effect of these differences on the market value of the merchandise will be considered, officials explained that this is rarely practical because all merchandise is uniformly affected by circumstance of sale and it normally is not possible to isolate the effects on market value of each of these items.

Customs regulations permit the calculation of margins on a weighted-average basis, which amounts to determining a weighted-average home market value and comparing it with individual sales to the export market. This method of determining margins between home and export market sales tends to enlarge existing margins or to create margins where none existed. However, in determining margins for duty assessment, officials are required to compare import sales values on an entry-by-entry basis to individuals home market values at the time of purchase or export rather than on weighted averages.

RULE 29.1 STATEMENT
CEMEX SUBSIDIARIES

MEXICO:

Agricola Prima, S.C.; Anahuac Administracion, S.C.; Anahuac Empresa Inmobiliaria, S.A.; Arcilla, Calia y Yeso Anahuac S.A.; Arenera del Oriente, S.A. de C.V.; Arrendadora de Maquinaria, Equipo y Inmuebles, S.A. de C.V.; Cal Guadalajara, S.A. de C.V.; Cecord Inc.; Cegusa, S.A.; Cemento Portland Nacional, S.A. de C.V.; Cementos Anahuac, S.A. de C.V.; Cementos Anahuac del Atlantico, S.A. de C.V.; Cementos Anahuac del Pacifico, S.A.; Cementos Atoyac, S.A. de C.V.; Cementos de Oritente, S.A. de C.V.; Cementos del Pacifico S.A. de C.V.; Cementos del Valle, S.A. de C.V.; Cementos del Yaqui, S.A. de C.V.; Cementos Guadalajara, S.A. de C.V.; Cementos Maya, S.A.; Cementos Sinaloa, S.A. de C.V.; Cementos Tolteca, S.A. de C.V.; Cia. de Transportes del Mar de Cortes, S.A. de C.V.; Comercializadora Cemex del Pacifico, S.A. de C.V.; Compania Minera Atoyac, S.A. de C.V.; Concreto Premezclado Nacional, S.A. de C.V.; Concretos y Precolados, S.A. de C.V.; Conceretos de Alta Calidad y Agregados, S.A. de C.V.; Concretos del Bajio, S.A.; Concretos Guadalajara, S.A. de C.V.; Concretos Procesados, S.A.; Concretos Tamaulipas, S.A.; Concretos y Agregados de California, S.A. de C.V.; Distribuidora Mexicana de Materiales, S.A.; Empresas Tolteca de Mexico, S.A. de C.V.; Empresas Turisticas Cemex/Marriott, S.A. de C.V.; Explotadora de Canteras, S.A. de C.V.; Fomento de Cultura Obrera de Tlanepantla, A.C.; Fomento Industrial, S.A. de C.V.; Granos y Terrenos, S.A. de C.V.; Grupo Anahuac, S.A. de C.V.; Grupo Tolteca, S.A. de C.V.; Inmobiliaria Angeles Segovia, S.A.; Inmobiliaria Industrial Mazatleca, S.A. de C.V.; Inmobiliaria Z.P. Triangular, S.A. de C.V.; Instalaciones y Bodegas Portuaria y Terrestres Anahuac, S.A.; Mano de Obra Industrial y Tecnica, S.A. de C.V.; Maquiladora y Distribuidora de Materiales para la Construccion, S.A. de C.V.; Materiales Valladolid, S.A. de

C.V.; Materias Primas Anahuac del Golfo, S.A.; Organizacion Operadora de Constructoras Lomex del Norte, S.A. de C.V.; Polimero Cemex, S.A. de C.V.; Polycemex, S.A. de C.V.; Preconcreto, S.A. de C.V.; Proambiente, S.A. de C.V.; Productora de Extruidos, S.A.; Productos Calcarios, S.A. de C.V.; Proveedora Mexicana de Materiales, S.A. de C.V.; Servicios Automecanicos, S.A. de C.V.; Simifa, S.A. de C.V.; Tolmex, S.A. de C.V.

SPAIN:

Aerocemex; Aridos Clasificados de Fuerteventua, S.A.; Aridos Formigons, S.A.; Aritong, S.A.; Balear de Hormigones, S.A.; Cantera Vimer, S.A.; Canteras Ibericas, S.A.; Cementos Ceuta, S.A.; Cementos de las Islas, S.A.; Cementos de Mallorca, S.A.; Cementos del Atlantico, S.A.; Cementos del Mar, S.A.; Cementos del Sureste; Cementos Especiales, S.A.; Cementos La Palma, S.A.; Cementos Peyland, S.A.; Cementos Portland Morata de Jalon, S.A.; Cenizas Volantes de Cataluna y Aragon, S.A.; Comercial Aridos Canarios, S.L.; Compania Internacional de Cementos, S.A.; Compania Valenciana de Cementos Portland, S.A.; Depositos y Mallorca, S.A.; Hormigones de Toledo, S.A.; Hormigones del Este, S.A.; Hormigones Fumet, S.A.; Hormigones Ibiza, S.A.; Hormigones La Costera, S.A.; Hormigones Mecanizados, S.A.; Hormigones Menorca, S.A.; Hormigones Palma, S.A.; Hormigones Servol, S.A.; Hormigones Torrevieja, S.A.; Hormigones Varela de Andalucia, S.A.; Hormigones y Cenizas Andalucia, S.A.; Hormigones y Fabricados, S.A.; Hormisol Canarias, S.A.; HRC, S.A.; Intral, S.A.; K.M.K.; La Auxiliar de la Construccion, S.A.; Macrel, S.A.; Magatzem Cos Nou, S.L.; Materiales Hidraulicos Griffi, S.A.; Mediterranea de Hormigones; Morteros de Mediterraneo, S.A.; Morteros Ibericos, S.A.; Morteros y Cementos de Baleares, S.A.; Morteros y Hormigones del Tajo, S.A.; Portcement, S.A.; Portland Albacete, S.A.; Portland Iberia, S.A.; Prebesec Aragon, S.A.; Prebesec Ibiza, S.A.; Prebesec Valencia, S.A.; Prebetong Aragon,

S.A.; Prebetong Canarias, S.A.; Prebetong del Este, S.A.; Prebetong Extremadura, S.A.; Prebetong Madrid, S.A.; Prebetong Menorca, S.A.; Prebetong Noreste (Morteros de Andalucia, S.A.); Prebetong Oeste, S.A.; Prebetong Sureste, S.A.; Prebetong Valencia, S.A.; Prefabricados Ciudadela, S.A.; Prohosa-2, S.L.; S.A. Inmobiliaria Valenciana; Sahor Hormisol, S.A.; Sevilla 2000, S.A.; Silos de Pasajes; Suco, S.A.; Tecnicas de Anclajes, S.A.; Toledana de Bombeos, S.A.; Transporte y Bombeo de Hormigon, S.A.; Transportes Biniamar, S.A.; Transportes Colas, S.A.; Transportes de Cementos, S.A.; Transportes del Sureste, S.A.; Valencia Export S.L.; Valmix, S.L.; Ytong Barcelona, S.A.

VENEZUELA:

Agregados para Mezclas Aremix, C.A.; Agropecuaria Rosarito, C.A.; Banneret Limited; Bay Rock, Inc., C.A.; Vencemos Lara, C.A.; Vencemos Mara, C.A.; Vencemos Pertigalete, C.A.; Venezolana de Griferia, C.A.; Vzolana. de Acc. Industriales; Caja de Ahorro Vencemos; Canteras de Oriente, C.A.; Cementos Guayana, S.A.; Clipper; Com. de Cementos Catia La Mar, C.A.; Comercializadora Seles, C.A.; Comercializadora Vencemos (COMVENCEMOS), C.A.; Conomita, S.A.; Corporacion Autana, C.A.; Corporacion Financiera Vencemos, S.A.; Corporacion Metalmen, C.A.; Corporacion Venezolana de Cementos, S.A.C.A.; Dist. de Cementos Porlamar, C.A.; Edesa; Emprendedora Shipping Co.; Espartana Shipping Co.; Finca Vencemos, C.A.; Fundicion de Aceros Mara, C.A.; Independiente Shipping Co.; Inmobiliaria 2022, C.A.; Inmobiliaria 220, C.A.; Inmobiliaria Caseban, S.A.; Inmobiliaria Coloca, C.A.; Inmobiliaria Valle Dos C.A.; Inmuebles Dirosal, S.A.; Inversiones 8136, C.A.; Inversiones Bripar, C.A.; Inversiones Cemento, C.A.; Inversiones Lyser, C.A.; Inversiones Pamatacualito, C.A.; Inversiones Rathenau, C.A.; Inversiones Vencemos, C.A.; Lafarge Coppee; Laveda Company Limited; Lema Holding; Leona Shipping Co.; LL Trading Company Limited;

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CAYMAN ISLANDS:

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UNITED STATES OF AMERICA:

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PANAMA:

Ceser, S.A.; Dixon Corporation; Maritima del Golfo, S.A.; Operadora Cementera Maritima, S.A.

REPUBLICA DOMINICANA:

Hispano Dominicana de Cemento Blanco, S.A.; Hotelera del Atlantico, S.A.

OTHERS:

Cardington Ltd. (Bermuda); Ciments Blanc du Maroc, S.A. (Morocco); Desa Portugal (Portugal); Maya-Belize Cement Limited (Belize); Sandworth Plaza Holding B.V. (Netherlands); South East Enterprises, Inc. (British Virgin Islands)